[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 321

RUBY NELL THOMSON, PETITIONER,

vs.

TEXAS & PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT, ABILENE DIVISION

No. 1322 Civil

RUBY NELL THOMSON, A Widow,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY

COMPLAINT—Filed February 2, 1955

To The Honorable Judge of Said Court:

Comes now Ruby Nell Thomson, hereinafter styled plaintiff, and complains of the Texas and Pacific Railway Company, hereinafter styled defendant, and for cause of action would show the Court as follows:

[fol. 2] I

The plaintiff resides in Taylor County, Texas, and the defendant is a common carrier duly incorporated under the law of the State of Texas. Defendant has its principal place of business in Dallas, Dallas County, Texas, where service of citation may be had. This suit is the outgrowth of an injury sustained by the plaintiff while an employee of the defendant as a common carrier. This suit is brought under the provision of the Federal Employer's Liability Act and the amount in controversy, exclusive of interest and costs, exceeds Three Thousand and No/100 ($3,000.00) Dollars, and this Court therefore has jurisdiction.

II

This suit and cause of action arises under and is governed by the Federal Employers' Liability Act titled 45 USCA, Section 51 to 60. The plaintiff and defendant were at the time and on the occasion hereinafter mentioned engaged in Interstate Commerce or in working directly with or closely and substantially affecting or furthering

Interstate Commerce within the meaning of said Act. Defendant was on the occasion hereinafter mentioned and is now a Railroad Corporation assuming, maintaining, and operating a line of Railroad tracks as a common carrier and as a highway in Interstate Commerce within the State of Texas, and within this division of the Northern District of Texas making connections with other Interstate carriers along its line of railroad to destinations outside of the State.

[fol. 3] III

Plaintiff says that on or about 3 December 1952 plaintiff was employed by the defendant as an agent at Monahans, Texas. That as an agent, her duties includes among other things meeting the trains as they arrived in this station. On this day when the plaintiff met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman an*l* that the mail was extremely heavy, she asked her immediate superior, a man whose name is unknown to the plaintiff at this time, for help in unloading this heavy mail, but that her superior not only failed, but refused to give her any assistance whatsoever in unloading this heavy mail even though he and other people were available for assistance. Plaintiff says that this immediate superior then ordered the plaintiff to unload the mail and as she was attempting to do so, she injured her back causing severe injuries to her back as will be hereinafter set out. Plaintiff says that the defendant, its agent, servants and employees who were her superiors were guilty of negligence in the following manner:

1. Failure to furnish the plaintiff a safe place in which to work.

2. Requiring the plaintiff to perform heavy strenuous duties that were beyond her physical strength.

3. Failure to furnish the plaintiff assistance in doing heavy strenuous labor when there were people there to assist her.

[fol. 4] That each and every of the above acts constituted negligence and that this negligence was a proximate cause of the plaintiff's injuries and damages.

IV

Plaintiff says that immediately following her injury she suffered pains in her back, but thought that it was merely a strain which would go away; and since she had the day off after the day on which she was injured, she stayed at home. That on the next day she went to the hospital for treatment of her injuries and remained in the hospital until March 1953. That she suffers from a constant aching in her lower back when sitting or standing. That this pain radiates from her lower back down into her left hip and leg. That she cannot even sleep on her back because of pain in her lower abdomen. She suffers from severe headaches and extreme nervousness. That there is a limitation of motion in the dorsal and lumbar regions of her back with pain associated with bending. There is a marked muscle tenderness in the dorsal and lumbar regions with a muscle spasm on both sides of the lumbar area. That she suffers from a scoliosis of the upper dorsal of the spine to the right and interruption of the disc between the ninth and tenth dorsal vertebrae on the right side causing the left side of her pelvis and hip to be higher than the right. That there is a herniation of the disc between the fourth and fifth lumbar vertebrae with a compression fracture of the body of the fourth lumbar vertebrae on the left side and a posterior dislocation of the first sacral vertebra on the fifth lumbar. That she suffers from a narrowing of the lumbosacral joint space and spine bifida occulta causing total and permanent disabilities as will be more fully set out. That all of these injuries are the direct and approximate result of the negligence of the [fol. 5] defendant, its servants, agents and employees and these injuries are permanent in nature.

V

Plaintiff says that prior to the time she was injured she was a strong healthy woman 29 years old with a life expectancy of 40.36 years. That she was capable of earning and did earn a salary in the amount of One and 83/100 ($1.83) Dollars per hour while working for this defendant. That although she has attempted to work since the day of her injury, her physical condition is such that she can-

not do any work in any manner. That these injuries are permanent and that she will be unable to work for the rest of her natural life to her damages in the sum of Twenty-five Thousand and No/100 ($25,000.00) Dollars for which she here sues.

VI

Plaintiff says that she has been in continuous pain since the date of her injuries. That at times the pain is worse than at other times, but that she has never been free from pain and that this pain will continue with her for the rest of her natural life to her damage in the sum of Twenty-five Thousand and No/100 ($25,000.00) Dollars for which she here sues.

Wherefore, Premises considered, plaintiff prays that the defendant be cited in terms of law to appear and answer herein and that upon final hearing she have judgment in the amount of Fifty Thousand and No/100 ($50,000.00) Dollars; for costs of suit and for such other and further [fol. 6] relief to which she may be entitled either at law or in equity.

Beverly Tarpley, Attorney for Plaintiff.

Of counsel:

Scarborough, Yates, Scarborough & Black.
Abilene, Texas

In United States District Court

Plaintiff's Request for Jury

Plaintiff requests a jury.

In United States District Court, for the Northern District of Texas, Abilene Division

[Title omitted]

Answer—Filed March 9, 1955

To the Honorable Judge of Said Court:

Comes Now the defendant in the above styled and numbered cause, and in reply to plaintiff's complaint, would respectfully show the Court as follows:

First Defense

The plaintiff's complaint fails to state a cause of action, either at law or equity upon which the plaintiff might recover.

Second Defense

The defendant would respectfully show that Ruby Nell Thomson, the plaintiff, at the time she alleges having [fol. 7] received certain injuries, was a married woman and that since that date she has divorced her husband; that both she and her husband of that date were, and ever since have been, residents and domiciliaries of the State of Texas, and that any proceeds which plaintiff might derive from this suit would be community property of the plaintiff and her former husband, and that her former husband is not joined herein and is an indispensable party, or in the alternative, a necessary party to this action.

Wherefore, defendant prays that the Court dismiss this suit.

Third Defense

The defendant admits the allegations contained in Paragraphs I and II of plaintiff's complaint, except the third sentence in Paragraph I which is denied.

Defendant admits the first two sentences contained in Paragraph III of plaintiff's complaint, but denies each and every remaining allegation thereof.

Defendant denies the allegations contained in Paragraphs IV, V and VI of plaintiff's complaint.

Fourth Defense

This defendant states in the alternative and in the event it be mistaken in its above denials, that in the event the

plaintiff is suffering any disability, which is not admitted but denied, that such disability is due and is the direct result of prior existing diseases and/or congenital defects not in any manner connected with the plaintiff's employment by this defendant.

[fol. 8] Fifth Defense

In the alternative this defendant states that any injuries suffered by the plaintiff, which is not admitted but denied, were solely caused by various numerous negligent acts and omissions, each of which was the sole proximate cause of the injuries, if any.

Sixth Defense

In the alternative this defendant states that any injuries suffered by plaintiff, which is not admitted but denied, were caused by negligent acts and omissions on behalf of the plaintiff, each of which negligent acts and omissions contributed to the plaintiff's injuries, if any.

Seventh Defense

Answering further herein, if same be necessary, this defendant states that the plaintiff's injuries, if any, were not caused by any negligent act or omission on behalf of any of the officers, agents, servants or other employees of this defendant, nor by any violation of the Safety Appliance Act, and that the plaintiff best knew her own capabilities and strength and accepted the employment which carried with it the duty of loading and unloading packages, which plaintiff well knew, and that in the event she was injured while loading or unloading packages, that she assumed any risk inherent in loading and unloading such packages.

[fol. 9] Wherefore, premises considered defendant prays that upon final hearing hereof it go hence with its costs without d--ay.

Wagstaff, Harwell, Alvis & Pope.

P. O. Box 360,
Abilene, Texas.
By J. B. Look, Jr.,
Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT, ABILENE DIVISION

[Title omitted]

AMENDED COMPLAINT—Filed March 23, 1955

To the Honorable Judge of Said Court:

Comes now Ruby Nell Thomson, hereinafter styled the Plaintiff, R. J. Thomson, hereinafter styled involuntary Plaintiff, and complains of the Texas and Pacific Railway Company, hereinafter styled Defendant, and for cause of action would show the Court as follows:

I

The Plaintiff resides in Taylor County, Texas, and the Defendant is a common carrier duly incorporated under the law of the State of Texas. Defendant has its principal [fol. 10] place of business in Dallas, Dallas County, Texas, where service of citation may be had. This suit is the outgrowth of an injury sustained by the Plaintiff while an employee of the Defendant as a common carrier. This suit is brought under the provision of the Federal Employer's Liability Act and the amount in controversy, exclusive of interest and costs, exceeds Three Thousand and no/100 ($3,000.00) Dollars, and this Court therefore has jurisdiction.

II

Plaintiff, Ruby Nell Thomson would show that at the time this cause of action arose she was married to the involuntary plaintiff, R. J. Thomson, although the parties were at that time permanently separated. Thereafter the Plaintiff, Ruby Nell Thomson, and the Involuntary Plaintiff, R. J. Thomson, were duly and legally divorced by order of the District Court in Mitchell County, Texas, wherein parties resided at that time. Plaintiff would show that the said R. J. Thomson has abandoned said cause of action and fails and refuses to prosecute same. That he has at all times failed and refused to prosecute said cause of action. Plaintiff here makes said R. J. Thomson an Involuntary Plaintiff, and prays that upon final hearing

this Court adjudicate the interest, if any, that the said R. J. Thomson might have in any recovery by the Plaintiff herein on this cause of action.

III

This suit and cause of action arises under and is governed by the Federal Employers' Liability Act titled 45 USCA, Section- 51 to 60. The Plaintiff and Defendant were at the time and on the occasion hereinafter men- [fol. 11] tioned engaged in Interstate Commerce or in working directly with or closely and substantially effective or furthering Interstate Commerce within the meaning of said Act. Defendant was on the occasion hereinafter mentioned and is now a Railroad Corporation assuming, maintaining, and operating a line of Railroad tracks as a common carrier and as a highway in Interstate Commerce within the State of Texas, and within this division of the Northern District of Texas making connections with other Interstate carriers along its line of railroad to destinations outside of the State.

IV

Plaintiff says that on or about 3 December 1952 Plaintiff was employed by the Defendant as an agent at Monahans, Texas. That as an agent, her duties included among other things meeting the trains as they arrived in this station. On thise day when the Plaintiff met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman and that the mail was extremely heavy, she asked her immediate superior, a man whose name is unknown to the Plaintiff at this time, for help in unloading this heavy mail, but that her superior not only failed, but refused to give her any assistance whatsoever in unloading this heavy mail even though he and other people were available for assistance. Plaintiff says that this immediate superior then ordered the Plaintiff to unload the mail — as she was attempting to do so, she injured her back causing severe injuries to her back as will be hereinafter set out. Plaintiff says that the Defendant, its agent, servants and employees who were her

superiors were guilty of negligence in the following manner:

[fol. 12] 1. Failure to furnish the Plaintiff a safe place in which to work.

2. Requiring the Plaintiff to perform heavy strenuous duties that were beyond her physical strength.

3. Failure to furnish the plaintiff assistance in doing heavy strenuous labor when there were people there to assist her.

That each and every of the above acts constituted negligence and that this negligence was a proximate cause of the Plaintiff's injuries and damages.

V

Plaintiff says that immediately following her injury she suffered pains in her back, but thought that it was merely a strain which would go away; and since she had the day off after the day on which she was injured, she stayed at home. That on the next day she went to the hospital for treatment of her injuries and remained in the hospital until March 1953. That she suffers from a constant aching in her lower abdomen. She suffers from severe headaches and extreme nervousness. That there is a limitation of motion in the dorsal and lumbar regions of her back with pain associated with bending. There is a marked muscle tenderness in the dorsal and lumbar regions with a muscle spasm on both sides of the lumbar area. That she suffers from a scoliosis of the upper dorsal of the spine to the right and interruption of the disc between the ninth and tenth dorsal vertebrae on the right side causing the left side of her pelvis and hip to be higher than the right. That there is a herniation of the disc between the fourth and fifth lumbar vertebrae with a compression fracture of the [fol. 13] body of the fourth lumbar vertebrae on the left side and a posterior dislocation of the first sacral vertebra on the fifth lumbar. That she suffers from a narrowing of the lumbo-sacral joint space and spina bifida occulta causing total and permanent disabilities as will be more fully set out. That all of these injuries are the direct and proximate result of the negligence of the defendant, its

servants, agents and employees and these injuries are permanent in nature.

VI

Plaintiff says that prior to the time she was injured she was a strong healthy woman 29 years old with a life expectancy of 40.6 years. That she was capable of earning and did earn a salary in the amount of One and 83/100 ($1.83) Dollars per hour while working for this Defendant. That although she has attempted to work since the day of her injury, her physical condition is such that she cannot do any work in any manner. That these injuries are permanent and that she will be unable to work for the rest of her natural life to her damages in the sum of Twenty five thousand and no/100 ($25,000.00) Dollars for which she here sues.

VII

Plaintiff says that she has been in continuous pain since the date of her injuries. That at times the pain is worse than at other times, but that she has never been free from pain and that this will continue with her for the rest of her natural life to her damage in the sum of Twenty five thousand and no/100 ($25,000.00) Dollars for which she here sues.

[fol. 14] Wherefore, Premises Considered, plaintiff prays that the defendants be cited in terms of law to appear and answer herein and that upon final hearing she have judgment in the amount of Fifty thousand and no/100 ($50,000.00) Dollars; that the Court determine the interest, if any, of the Involuntary Plaintiff, R. J. Thomson, for costs of suit and for such other and further relief to which she may be entitled either at law or in equity.

Beverly Larsley, Attorney for Plaintiff.

Of Counsel:

Scarborough, Yates, Scarborough & Black,
Abilene, Texas.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Disclaimer of Plaintiff, R. J. Thomson, Jr.—Filed April 28, 1955

Comes Now R. J. Thomson, Jr., Involuntary Plaintiff in the above styled and numbered cause and files this his disclaimer in subject cause disclaiming any interest he may have in said action.

R. J. Thomson, Jr., (R. J. Thomson, Jr.)

[fol. 15] In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Transcript of Proceedings—Filed June 29, 1955

Be It Remembered that on the 27th day of April, A. D. 1955, the above styled and numbered cause came on for hearing before Honorable T. Whitfield Davidson, Judge, and a jury, whereupon the following proceedings were had:

Appearances:

Scarborough, Yates, Scarborough & Black, Abilene, Texas, by Mrs. Tarpley and Mr. Davis Scarborough, appearing for plaintiff.

Wagstaff, Harvell, Alvis & Pope, Abilene, Texas, by Mr. Alvis and Mr. Look, appearing for defendant.

RUBY NELL THOMSON, the plaintiff, produced on her on behalf, being first duly sworn, testified as follows:

Direct examination.

By Mrs. Tarpley:

Q. State your name, please?
A. Ruby Nell Thomson.
Q. Speak out, Ruby Nell, so that the last member of this jury panel can hear you.
[fol. 16] A. Ruby Nell Thomson.
Q. Where do you live, Ruby Nell?
A. Merkel, Texas.
Q. And how long have you lived in Merkel, Texas?
A. Since last May.
Q. Are you married or are you single presently?
A. I am single now.
Q. Do you have any family, or anyone living with you?
A. I have my three children.
Q. And what are the ages of those three children?
A. The oldest——

Mr. Alvis: Wait a minute. Was that sisters?
Mr. Look: No, her children.
Mr. Scarborough: Go ahead.

A. The oldest, Tommy, he is ten; and then I have twins, a boy and a girl that will be nine in July.

By Mrs. Tarpley:

Q. What is your age, Mrs. Thomson?
A. 30.
Q. 30?
A. Uh-huh.
Q. Have you ever been employed by the Texas & Pacific Railway Company?
A. Yes.
Q. When were you first employed by the Texas & Pacific Railway Company?
A. In February of 1943.
[fol. 17] Q. And where were you employed for them?
A. In Louisiana, and my first job was at Maringouin, Louisiana.

Q. How long did you work steadily for the Texas & Pacific Railway at that time?

A. From February of '43 through, I think it was May of '44.

Q. And did you then leave their service?

A. I resigned.

Q. Did you then return to work for the Texas & Pacific Railway Company?

A. Yes, in September, September 5, 1951.

Q. And where were you employed for them in 1951?

A. At Colorado City.

Q. In what capacity were you employed?

A. Agent-Operator.

Q. Now, tell us, Mrs. Thomson, what the duties of an agent-operator are for the Texas & Pacific Railway Company?

A. Well, to handle train orders, copy telegrams when they wire in Morse code, sell tickets, handle mail, baggage, check baggage, and do such clerical work as the agent at each station sees fit to assign to you, it will vary from station to station.

Q. Were you regularly assigned to one station in 1951 or were you working several stations?

A. No, not in 1951. I worked what we called the extra board and that was just whenever I could go, I was so young in seniority that I would just work where there was work available for me and I did not bid on any job and get the job that I bid on in 1951.

Q. What do you mean by bidding on a job?

A. Well, that is, vacancies arise through death, and different things, and these bulletins are put out, stating the hours you work and the rate of pay and all those that are [fol. 18] interested in it bid on it and then the one that has the most seniority, that desires the job, is assigned to the job.

Q. What was your first regular assignment for the Texas & Pacific?

A. At Monahans.

Q. Did you bid on that job?

A. Yes, I did.

Q. All right, when were you assigned to that job?

A. I don't remember. It was between the 5th and 15th of October, I don't know the exact date, I couldn't say.

Q. Of what year?

A. '52, 1952.

Q. And what was your capacity there at Monahans?

A. Well, I was to work from 12:00 midnight until 8:00 in the morning, sell tickets, handle my train orders, and my train, take care of any clerical work that the agent saw fit to assign to me, and work the passenger train, I had one passenger train on my shift and it came at 7:20 in the morning and I was to work the mail and baggage, just anything that the agent saw fit to assign.

Q. Now, what division, so far as the Texas & Pacific Railway Company is concerned, controls the station there at Monahans?

A. Well, it is—the division goes from Big Spring west to El Paso and that is the western end of the Western Division, I believe.

Q. Had you previously worked in this division that ran from Big Spring to El Paso?

A. Yes, I had worked on it, I think two days, at Van Horn.

Q. Your last job before being assigned to Monahans, had it been in this Western Division?

A. No, no.

[fol. 19] Q. What division was it in?

A. It was from the division, Big Spring to Fort Worth.

Q. Now, were the women employees told to wear any particular kind of dress while working, while performing their duties?

A. Well, now, Mr. Tucker's division, he is the Assistant Superintendent between Big Spring and Fort Worth, which is where I worked most of the time, he asked we girls——

Mr. Alvis: Just a minute.

Your Honor, we would object to that character of testimony because it has no bearing whatever on the issues of this case since she was working on the Western Division.

Mrs. Tarpley: If the Court please, I believe this testimony is introductory, and we will show its relevancy and the way it relates to the issues of this lawsuit as the testimony is developed.

The Court: If it is going to be extensive in nature, why, I will ask you to state the purpose of it; otherwise, you go ahead.

Mrs. Tarpley: If Your Honor please, we will limit it to a very short degree.

The Court: Go ahead.

Mrs. Tarpley: And take it very rapidly.

[fol. 20] The Court: Unless something prejudicial arises you may do so.

By Mrs. Tarpley:

Q. Mrs. Thomson, without stating in detail your conversation with the member of any other division will you tell us, please, what manner of dress you were instructed to wear while in this division?

A. Wear skirts and hose and dress as a lady.

Q. Upon being transferred to the Western Division, the division that Monahans was in, did you say anything to any of the railroad company employees about your manner of dress?

A. Yes.

Mr. Alvis: Just a minute.

Your Honor, we would object to any testimony along that line unless she shows who the conversation was with, and as to whether it was her superiors, or not.

The Court: Are you asking for the conversation? I did not so understand.

Mrs. Tarpley: We are asking for the name of the superior and also the conversation.

If the Court please, this is a conversation with an employee of the defendant, and we think certainly relevant to this cause of action.

The Court: I think over objection that it would hardly be admissible, to introduce conversations along this line. You can tell what was required of her and what she did.

[fol. 21] Mrs. Tarpley: Yes, Your Honor.

By Mrs. Tarpley:

Q. Ruby Nell, without discussing any conversations, will you tell the Court and jury what you were instructed to wear while performing your duties there at Monahans?

A. Well, I was instructed that it was all right to wear my skirts and hose and dress and look as a lady, especially when I was to meet the public, where the passenger train was concerned, and as long as my duties were performed satisfactorily that it was all right for me to wear my skirts and dress as a lady and that would eliminate me from having to jump up on these mail carts, which you couldn't do in a skirt and hose and heels, you just couldn't do that.

Q. Tell the Court whether or not it was possible for you to climb on to these baggage carts and handle the mail if you were dressed in that manner?

A. Well, it is just—it is just impossible, with all the men that are there, and you just have to monkey up on it, you have to climb up on the wheels in order to get up on to the cart.

Q. And you were instructed it was all right for you to wear skirts, is that correct?

A. Just as long as my duties went along satisfactorily and there was no delay in the train it was perfectly all right and he thought it was a fine idea.

Q. How often did you have to handle mail while performing your duties there at the Monahans station?

A. Well, after this agreement, oral agreement I had, I didn't handle the mail for some time.

Q. Who handled the mail there at Monahans?

A. One of the men, he worked, I believe now, for the motor transport, and there were other girls there in the [fol. 22] station and they always just kind of pitched in and helped the girls like that.

Q. What particular hours did you work there in the station in Monahans?

A. 12:00 Midnight to 8:00 a. m.

Q. How many trains come through during that period of time that carried mail?

A. Just the one.

Q. Just the one train?

A. Just the one, Number Two.

Q. And what time did that train arrive at the station?

A. If it was on time, around 7:20; it did not vary very much.

Q. 7:20 in the morning?

A. 7:20 a. m.

Q. Now, how long had you been at the Monahans station before you were—you suffered this injury on the 3rd of December?

A. Well, like I say, I went to work some time between the 5th and the 15th of October and I worked up until the 3rd.

Q. During that interval of time, from the time you went to work out there until the time that you were injured, how many times did you yourself personally handle the mail?

A. I couldn't say just how many times, but from the time that my instructions had been changed, that I was to work the mail, I worked it every morning that I worked, I don't know how many mornings it was.

Q. When were your instructions changed as to the handling of the mail? And by whom were they changed?

A. I don't know the date, it was just an oral conversation and it was some time the latter part of November.

Q. Latter part of November?

A. Yes.

[fol. 23] Q. Before this accident occurred on the 3rd of December?

A. That is right.

Q. And by whom were those instructions given to you?

A. The agent, Mr. Higginbotham.

Q. Mr. Higginbotham?

A. Mr. Higginbotham.

Q. Now, was he your superior there at the station?

A. My immediate superior.

Q. Your immediate superior?

A. That is right.

Q. By whom had your previous instructions been given to you as to the way you were to dress and so on?

A. By the Assistant Superintendent, Mr. Lacroy.

Q. And was he higher in the railroad scale than Mr. Hig-inbotham, or lower?

A. Oh, yes, yes.

Q. He was higher?

A. Higher.

Q. Now, your conversation you had about it, not what

conversation, was with your immediate superior, is that correct?

A. Yes.

Q. And what did he tell you at that time with reference to handling of the mail?

A. Well, he told me that I had to handle it regardless, that I had hired out to do a man's job and I was receiving the same pay and those were the duties he saw fit for me, to assign to me, and that I was to do them.

Q. Who else was normally at the station? I mean by that, Texas & Pacific employees normally at the station at the time of morning that that Number Two train arrived?

A. Well, I couldn't say—there were—there is a train crew that makes up about that time, that leaves Monahans, [fol. 24] going to the Lovington, New Mexico on the T&NM, and there is a clerk that comes at about 5:00 o'clock in the morning and did some clerical work, got the waybills ready for this train, and usually the agent was there, and then there were men that work outside. Of course, from the time then on, coming up until I got off at 8:00 was my very busiest moment during the night, due to my passengers, train and tickets and gaggage and train crews coming in and asking for train orders and things, it was very busy, I couldn't say who was there, or how many.

Q. When Mr. Higginbotham instructed you to handle the mail yourself did you say anything to him about other employees at the Texas & Pacific?

A. I don't understand what you mean by that?

Q. Did you say anything to Mr. Higginbotham about any other employees of the T&P handling the mail, or being able to handle the mail?

A. Well, I told him that morning that I had—that this Mexican had been handling it for me voluntarily, and that there was another girl that worked there and he worked it for her and that I couldn't work it and wear my skirts and hose.

Q. And he instructed you that you were to handle it personally?

A. He said that I was to handle it anyway, regardless.

Q. Now, on the morning that this accident occurred, that was the 3rd of December, was it not?

A. Yes.

Q. Did the Number Two train arrive on time?

A. I don't know if it was right on time, but fairly close to it, I think.

Q. When the train stopped did it stop right at the station or did it stop a little farther down from the station?

[fol. 25] A. Well, reasonably close, about where it usually stops; it always varies, they never stop in the same place.

Q. How many cars were you supposed to take the mail off of?

A. Two, I believe, baggage and mail; there were some newspapers, and I think there were two cars that I worked, I just couldn't say for sure.

Q. On the morning that this accident occurred state what you did with reference to unloading any mail on the Number Two?

A. Well, there was a little door off from the office that I worked in, in the baggage room, there was this cart, and the post office official, or the employees of the post office would stack these packages and mail on this cart and lock the door and when Number Two came in, why, I would take and unlock the door and take the cart out, down a little ramp, and park it where I thought the train, the baggage cars and the mail car would stop.

Q. Describe this little cart you are talking about to the jury now?

A. Oh, well, everybody has seen the cart, it is little yellow carts with kind of a little fence at the front, and fence at the back, and it is flat, large wheels and a long tongue that you pull it out.

Q. Was the mail stacked on this cart in individual packages and letters, or is it just—or was it bundled together?

A. Well, it was these large, gray pouches with the lock on them.

Q. Each pouch was locked?

A. Oh, yes.

Q. Tell us then what you did when you got this little yellow cart out of the baggage room?

[fol. 26] A. Well, I pulled it out, as I say, and I parked it next to the train, and then the train comes in and stops

and then the man opens whichever door you are supposed to go to, and you go and you back the cart up or pull it forward, whichever is required.

Q. When you say back it up or pull it forward, does that cart have any kind of motor on it?

A. Oh, no, no. In other words, yourself, you move it yourself.

Q. All right, did you move the cart to where the——

A. Yes. And then you have to—there is a chain and you have to put a stop under the wheels to make it secure and then you hook the chain up to the tongue to keep it from banging around and then you climb up on the wheel to the cart, and then you start moving the baggage and the mail from the cart into the car, into the mail car, and then he moves it out of the way; you are not supposed to get into the car and he is not supposed to get off of the car on to the cart, and all that, you know, and then he lifts the, what he has for me, off, and I put it and stack it on my cart.

Q. Now, how much mail did you take off the train that morning?

A. As to the number I couldn't say, but I worked mail at other places and I had done that for years and I couldn't—I couldn't say, but I know I was completely fatigued, it was beginning to be heavy, the Christmas rush was just in the beginning, you know.

Q. Do you know how many mail pouches you took off the train?

A. No, I couldn't say the number, but the cart was fairly full.

Q. Did you take any magazines or newspapers or bundles of magazines or newspapers?

A. Yes.

[fol. 27] Mr. Alvis: Just a minute, Your Honor, there are no pleadings here that she handled anything except the mail, and we object to any testimony regarding her handling anything except the mail.

Mrs. Tarpley: If the Court please, there bundles of newspapers and magazines were being transported by the United States Mails, it would be part of the mail, but they were bundled together, they would certainly be part of

the mail, having been posted, and were carried by the United States Mail.

The Court: Well, there was some mixture or confusion, so we will hear it and move along.

By Mrs. Tarpley:

Q. Would you answer the question? Did you take any bundles of newspspers or magazines off of the train?

A. Yes, magazines and papers, both.

Q. Do you know how many bundles you took off?

A. No. Like I say, I was—I was already in pain, and I couldn't remember exactly how many, and from the time I got down off the cart until the time I got off I wasn't ever myself, I couldn't say for sure how many bundles there were.

Q. When you got off the cart what did you do then?

A. Well, I attempted to move it, and I got this, this horrible pain below my waist, in the back, in the flat part of your back, and I really thought something had hit me, and I became nauseated, and I just couldn't move, I couldn't move the cart, I couldn't hardly move myself; and I don't know until yet who moved the cart or anything about it; but I went back into the office and finished [fol. 28] my duties as best I could and went home. It was just about, oh, I would say twenty-five or thirty minutes later that I was off duty.

Q. What other employees of the T&P were at the station on the morning of December 3rd while you were unloading this train?

A. Just like I say, all of those I have mentioned, and then when the passenger train came in, then, of course, all the employees on it were there, the conductor and the brakemens were on the ground walking around, and so forth.

Q. Now, what did you do after you got home?

A. Well, there was someone come and got me and took me home, and as I have said, it was Wednesday night, and Thursday night I didn't have to work, and I just went to bed and I stayed in bed all of that day and that night and the next day and night, and then Friday morning I had an appointment to see a party downtown and

I was attempting to stay on my feet long enough to dress and fix my face and all, and I was in the bathroom, and someone was to come and get me, and I heard it ring, the doorbell, and then I just passed out on the floor, and then I was carried to the hospital that morning.

Q. What hospital were you taken to at that time?

A. To the hospital in Monahans, I think it was the Bell Clinic or the Bell Hospital or something, I forget; it was the only hospital there.

Q. I beg your pardon?

A. It was the only hospital there, I just never noticed the name of it, it was just the hospital.

Q. By whom were you treated there?

A. By Dr. Bell.

Q. How long did you remain in the Bell Hospital?

A. Oh, I don't know, three or four days, something like that.

[fol. 29] Q. And then where did you go?

A. I went back out to the house to—he said it was just—I begged to be out of the hospital, so; I had no one to visit me, and it was just miserable being there, I was out there all alone in this part of the country, and I went back up to Mrs. Taylor's home where I was rooming and I was there for three or four days, and this became worse and worse and worse, and then Dr. Bell said he couldn't do anything more for me, that I should go to the District Hospital at Big Spring, the T&P Hospital at Big Spring.

Q. Did you then go to the T&P Hospital?

A. Yes, I did.

Q. And how long did you remain at the T&P Hospital?

A. Oh, the rest of December, and January, and through February and on up into March some time, I forget just when.

Q. By whom were you treated while you were in the Big Spring hospital?

A. Dr. Broderick, Dr. B. Broderick.

Q. Were you in the Big Spring hospital continuously from December, the period in December when you went, until March, '53?

A. No. They were treating me for a kidney ailment and I kept saying I was hurting and of course, there was quite a bit of blood in my urine and so forth, and they

were treating me for my kidneys and my kidneys were cleared up and I would say, "Oh, my back, it still hurts, my back hurts."

So, he trought maybe I had kidney stones and every time I would raise up enough to be moved around, even on to one of these little rolling beds, I would just become so nauseated I would have to just lie back down.

And so, finally, after a few days they—with that in mind, they got me downstairs to the x-ray room and [fol. 30] put dye in my veins, and so forth, to make x-rays for kidney stones, and when he did then he found this vertebra out of line, and then he had me turn on my side and took an x-ray, and it was very, very apparent then.

Mr. Look: If it please the Court, we object to any apparency from any x-rays unless they are in evidence.

Mrs. Tarpley: If the Court please, we will not pursue that.

The Court: All right then.

By Mrs. Tarpley:

Q. All right now, Ruby Nell, approximately when was it you had this series of x-rays you have just told us about?

A. Well, it is two, or maybe it was three, some time in the early part of February and——

Q. Of 1953?

A. '53, uh-huh.

Q. And you were still in the hospital at that time?

A. Yes.

Q. Had you been there constantly since the date of your injury, or, the date you first were admitted?

A. Since the date I had gone in. He told me——

Q. Let's don't tell what he told you.

A. Okay.

Q. It was in February, 1953 then when these x-rays were made, is that correct?

A. Yes, uh-huh.

Q. Now, what kind of treatment was given to you after these x-rays you have told us about?

[fol. 31] A. Well, he told me that my kidneys were completely——

Q. Without any reference to what he told you.
A. Well——
Q. Just what he did for you.
A. Well, he told me I was to take——

Mr. Alvis: Just a minute.

By Mrs. Tarpley:

Q. Never mind what he told you. What did he do for you, Ruby?

A. Well, he had me stay in bed and off my feet, and take extreme care with anything that I did, like getting out of bed, and never lift anything, not even my train case, or anything heavier than five or six or seven pounds, something like that, and to not lift or pull anything, just not to do that.

Q. Did this Dr. Brode*d*rick release you to go back to work at any time?

A. No, I was there in the hospital for some time and I wanted to go back to work. I finally got my strength to where I could walk and get about, and I had the children, and I had—I wanted to work, so, I talked to my superior there, he said I would require a release from the doctor.

So, I went to Dr. Broderick for a release and he said he couldn't give me a release to go back to work after he asked me what my duties were, and he just said I couldn't do that any more.

Q. When did you next return to work after your injury?

A. Some time in March. It was before the 19th, I remember, because it was my son's birthday and I remember specifically working on that night, but I had not been working very long. I couldn't say just the date that I went back to work.

[fol. 32] Q. But, in March?

A. Some time in March, before the 19th, after the 1st and before the 19th.

Q. All right. And what did you go back to doing then?

A. Well, of course, I had to give up the job at Monahans because I could not handle the mail there, and this vacancy came up, I don't know how, I don't know how it came to be, if it was through the boy's going into service, or what, but there was a vacancy at Odessa and the Odessa job

don't have to work mail, there is no heavy lifting at all, and they have a negro man there that takes care of the baggage, and carries it out, and you write the little stubs, and that is all you do for that.

Q. Did you then go back to work at Odessa?

A. Yes, I went to work at Odessa and I worked there——

Q. What were your duties there in Odessa?

A. I sold tickets and delivered my train orders, and at nights, when I worked at night, I worked all three shifts, two days each shift, six days a week there, and at night, when I worked the night shift I was the emergency telegraph for the Western Union for death messages and such, and I did some filing of delivery receipts and station records, and things like that, but very light work.

Q. Did you handle any baggage?

A. No.

Q. Or any mail?

A. No.

Q. How long did you remain at Odessa?

A. Well, I worked from that date in March through July 7th.

Q. And then where did you go to work?

A. Well, like I say, every week I worked six days I accumulated a difference, according to our forty hour law, [fol. 33] and then after five weeks of six days a week, why, I received five days of accumulation, plus my one day which I naturally would have, and it gave me six days in every five weeks in a lump sum, and at this time it had come up, and of course, working two days from 7:00 to 3:00 and then two days from 3:00 to 11:00 and then two days from 11:00 until 7:00 in the morning, I was just completely exhausted after I had worked those months.

Q. You had a week's vacation coming then?

A. Yes.

Q. Or approximately a week's vacation, and you took that. When did you next return to work?

A. Well, I came back the last—I think it was the 31st of August.

Q. And where did you go to work then?

A. I went to work in Midland, the 1st or 2nd of September, for two days.

Q. And were you regularly assigned to Midland?

A. No.

Q. Or were you just working extra?

A. No, it was a vacancy that had to be filled just for the two days, I think it was.

Q. Were you handling any baggage?

A. No.

Q. Or handling any mail at Odessa?

A. No baggage or mail, just clerical duties.

Q. Since the date of this accident have you handled any baggage or handled any mail?

A. No, sir.

Q. While working for the T&P?

A. No, sir.

Q. Have you worked for any one else besides the T&P?

A. No.

Q. Where else have you worked? And have you ever worked regularly?

[fol. 34] A. Not a regular job. I have worked over a long period of time doing, and what being sick, and not being able to come back and take over their duties, but from September 2nd and 3rd I didn't work again until December of that year.

Q. Have you ever been regularly assigned to any position or station with the T&P since the date of your injury?

A. No.

Q. Now, what pains have you suffered as a result of this injury and what parts of your body does it affect?

A. Well, in this place it hurts continuously, if I sit down or if I get up or if I bend over to pick up anything, or make up a bed, or especially opening doors, especially these heavy doors in office buildings, and things like that, or the car doors, and I just go out on a windy day at all, I just don't because——

Q. What area of your body do you feel this pain in?

A. Shall I show them the spot? I have to use my hands.

Q. All right, show the jury.

A. Most of the time, anyway, it is this right in here and across through there, and of course, it goes up, up and down, but this part right here in the flat place on my back there.

Q. Now, have you ever been free from pain in the area of your low back there since this injury?

A. No, to say I am completely free of pain, because I have not, like in moving my arms or my legs, if I am completely still, it hurts to lie down on the bed, but if I lie down flat on a hard bed or a hard mattress with the pillow under my stomach, I have to fix everything and then lie down on my stomach and relax, especially if I take some sort of sedative of some sort, well, I can rest well enough, and you just are inured to it and more or less learn to live with it after awhile.

[fol. 35] Q. Now, you had been working for the T&P for approximately a year before your injury, is that correct?

A. Well, a little over a year.

Q. During that time had you been able to perform the duties that were assigned to you?

A. Oh, yes.

Q. Had you ever had any difficulty or any pain in your back before this injury of December 3rd?

A. While I was working for the railroad?

Q. Well, at any time?

A. Not right there, no, I used to—of course. I had a bad ovary, I had had a bad ovary, oh, from the time I was fifteen on we knew it was bad and of course, I would have this through my left side and into my back, but after my twins were born I had surgery and had this ovary removed and my uterus was suspended and both my tubes removed and I never had any backache. It was more of a side ache than a backache then. It wasn't anything like this then, I just thought I had a backache then.

Q. When was that surgery performed?

A. Oh, let's see? I think it was in April of '47. The twins were born in '46 and they were eight months old, that is right.

Q. April, 1947?

A. Uh-huh, that is right.

Q. Between April, 1947 and December, 1952 had you had any difficulty with your back or any pains in your back?

A. No, no, from the surgery on I just—I really just felt wonderful, so far as being able to do anything I wanted to do.

Q. At the time you were injured what was your rate of pay, Mrs. Thomson?

A. Oh, about fourteen dollars and a few cents a shift.
[fol. 36] Q. And was that an eight hour shift?

A. An eight hour shift.

Q. Did you normally work a five day week or a six day week?

A. Normally a five day week; it is very few of the swing jobs—of course, I had worked the jobs on a week or two weeks, possibly, on the six days, but most of the time it was five days a week.

Q. Five days a week. Now, Mrs. Thomson——

A. Beverly, it hurts when I have to look around his head, and I can't see you.

Q. I will move over here. Will that be better?

A. Okay.

Q. On the morning of December 3rd when you were unloading this train had you climbed up on this cart in order to take what was off the cart and put it on to the train?

A. Oh, yes, I had to climb up on it.

Q. And how high was the floor of that cart off of the station platform, or the level that you were working from?

A. Oh, I would say three or three and a half feet, something like that; it more or less meets the level of the coaches that you work with.

Q. Of the floor of the baggage car?

A. Yes. Of course, it would vary on, depending on how much of a fill, or how much ballast, or how high the rail was, but usually they were pretty close to the same height.

Q. Now, I believe you have testified that this mail that you were moving from the cart on to the train was in locked pouches, is that correct?

A. Yes.

Q. And were those pouches lying flat on the floor of the cart?

[fol. 37] Q. Yes, one on top of the other, just stacked on there, kind of like you would stove wood or something.

Q. On what position then were you standing when you moved these pouches from the train on to the—from the cart on to the baggage car?

A. Well, it was very unlady-like but standing there spraddle legged you get your pouch and you had to just

kind of jump it with your knee and both hands and then throw it over into the—because you don't have enough room, you just pick it up and just flat it over there because it is so large and so cumbersome, you have to just kind of swing and get it on the cart, from the cart on to the coach.

Q. About how much would that pouch weigh, or would those pouches weigh?

A. Oh, they vary. I think they get all in them that they can; oh, I will say fifty or sixty or seventy or seventy-five pounds.

Q. Each pouch?

A. About.

Q. It was necessary for you then to pick up these pouches and swing them with your knee and swing them over on to the train?

A. Uh-huh.

Q. Is that right?

A. That is right.

Q. Approximately how many pouches did you put on to the baggage car that morning?

A. Like I say, I worked the mail so many places I couldn't say as to a number, but I know that there was quite a lot of them; I couldn't say how many; there was room enough for me to stand on there, and they keep them stacked at one end so you will have some place to stand in order to work. I would say there were—I will just try to figure, I will say ten or twelve, or maybe fifteen; they were, I would say fifty pounds apiece.

[fol. 38] Q. All right. And you moved each one of those pouches on to the car yourself?

A. Yes.

Q. You had no assistance from the postal employees in the baggage car?

A. No, they don't, they take them from you and put them where they want them, each one of them has a name on them, that is the reason it varies, because usually they are for these little towns, you know, they put all they have for this town in there, and he will drag it and place it in a certain place for his convenience so he can have it ready if it has to go off in the next station, and he is very busy

with his work inside the car, he just takes it from me and does what he is supposed to with it.

Q. And how did you get the mail that was coming to Monahans?

A. Well, he had it on one side, you see, these large doors roll open, and then on one side you have room to take what you have off, and he takes it from you on that side, and then you turn, you see, and on this end you take what he has for you off and put it here. You usually have one foot on the coach and one foot on the cart, that is the reason you put a chock under the wheel, so it won't roll with it, you take it off the train and put it on to the cart.

Q. Now, did he hand these bundles to you that you were taking off the train, or did you pick them up off the floor of the train?

A. Most of the times when he gets through putting his on he usually drags up the ones farthest back in the car up, because usually they don't help us with those off the car on to the cart, they don't do that.

Q. Then it was necessary for you to stand there with one foot against the coach and one foot on the cart?

[fol. 39] A. Yes.

Q. Did you have to bend over or stoop in order to pick up these bundles?

A. They were on the floor of the coach, and pick them up and put them on, and of course, you have to stack them neat enough so you can get them all on; those carts are about, I would say, oh, this wide.

Q. And about how close was the cart to the baggage door entrance then?

A. Oh, I would say eight or ten or twelve inches from it. As close as I could get it without the train knocking it over as it comes in and stops.

Q. It was necessary then for you then to reach over and pick up each bundle and swing it across this eight or ten inches and deposit it on your cart, is that right?

A. That is right.

Q. You did that with each one of those bundles that you took off of the train that morning?

A. Yes.

Q. Then did you climb down off the cart?

A. Yes.

Q. Now, when was it, Mrs. Thomson, that you felt this sudden pain in your back that you have told us about?

A. Well, when I got down off the cart I just felt like, oh, I was just rather dizzy and numb and foolish sort of feeling and then I moved the little chock from the wheel, if I remember correctly, and it was when I reached up and got this heavy hook thing, or tongue, and I put my weight on it to move it so that when the train moved out that it wouldn't take some of the bags or parcels, they have those long strings or ropes hanging from them and they have been known to catch on a ladder or something on these baggage cars and pull a pouch off and fall under the train and get cut up, so, we are asked to move the carts just as soon [fol. 40] as we are through loading them, and I remember something like that.

Q. Now, had you felt dizzy or nauseated or anything like that when you got up on to this cart?

A. No, I didn't start feeling real bad until I was about half way through I would say.

Q. Then when you got down and began to push the cart you felt this pain, is that correct?

A. I was pulling it.

Q. Pulling it?

A. Pulling it.

Q. Now, did that cart roll easy or did it move smoothly or was it difficult to pull?

A. Well, it didn't roll as easy as some of them rolled.

Q. What kind of tires did that cart have on, or wheels?

A. They are wood with a metal ring on them.

Mr. Look: May it please Your Honor, we object on the ground there is no pleading covering any of this, Your Honor, no pleading covering any injury while pulling a cart, or anything about a cart; it is not covered by the pleading.

Mrs. Tarpley: If the Court please, plaintiff has alleged she was injured while handling the mail, and I believe it has been developed from the plaintiff's testimony that all these things she is describing, these motions, were part of her duties in moving the mail.

The Court: Well, we will hear the evidence, that is testimony along this line.

[fol. 41] By Mrs. Tarpley:

Q. They were wooden wheels on this cart?
A. Yes, with a metal rim.
Q. All right.
A. Around them.
Q. And what kind of surface was the cart on? Was it concrete or——
A. No, I think it was this, oh, this asphalt, this black surface.
Q. It was a smooth surface then?
A. Reasonably, yes.
The Court: How much would you say the larger bags or parcels would weigh?
A. Well, Your Honor——

Mr. Scarborough: Speak out, Ruby Nell.

A. I couldn't say, I am just estimating, of course, some of them are awfully heavy; it all depends on what is in them. Most of them, so, I just couldn't say just exactly how heavy a thing I have lifted before.

Mr. Scarborough: If the Court please, awhile ago she said some of them ran up to fifty or seventy-five pounds, as I understood it.
Is that correct?
The Court: There is a bag of mail carrying magazines I believe they call hard heads. Did you have any of those to handle?

A. I don't know, I may have, but I didn't know they were called that.
[fol. 42] The Court: All right.

By Mrs. Tarpley:

Q. Before this accident occurred, Ruby Nell, had you been working steadily?
A. Yes, since September 5th in '51, I had worked steadily enough, but I had never been regularly assigned before.
Q. During that time, from September until October or

November when you went out to Monahans you were working the extra board, were you not?

A. That is right.

Q. You were not regularly assigned to any one station then?

A. No.

Q. Were you available for call in case of an emergency at any station?

A. Well, yes. A lot of the times a lot of the jobs come up for bid that my seniority would have permitted me to have gotten them, I suppose, but I didn't want to be away from the children; I worked as close to Colorado City as I could.

Q. During the time that you worked the extra board, or from September until your injury what was your rate of pay? Was it the same at each job?

A. Pretty close to that, it varied with different stations by two or three or four pennies an hour maybe.

Q. Now, during the time from September until October were you working a five day week or pretty close to a five day week?

A. You mean was I physically able?

Q. Yes.

A. Oh, sure, sure.

[fol. 43] Q. Now, since this accident occurred and since you have gotten on your feet again have you been able to work steadily at any one of the jobs that you have taken?

A. Well, no; of course, Dr. Broderick had given me this stop, that I wasn't to lift or pull ever again, and my superiors knew that, and of course, if there was work available where there was mail that had to be worked, even if my seniority was more than the one that bid on it, well, I just didn't bid on the job because I couldn't have worked it had I been assigned because I just couldn't handle the mail.

Q. Have you had to turn down positions since this accident happened that you would have been able to work before the accident?

A. That is right, yes.

Q. Now, so far as the jobs which have been offered since

your accident occurred, do the majority of them involve handling the mail or do they not?

A. Well, as a matter of fact, the very first job I worked on midnight on December 5th, the first duty I performed was to handle the mail; I mean, I worked in Colorado City from 12:00 Midnight until 8:00 in the morning, and Number Eight, that is our eastbound passenger at night, got there at 12:25 and that was the first thing I did, was handle the mail there.

Q. Is it normally part of the agent-operator's job to handle mail?

A. Oh, yes, yes.

Q. You have asked in this lawsuit and in this petition for damages as a result of the difference in your earning power before this accident occurred and after this accident occurred. Tell the jury, if you will, just what the difference is between your earnings, or the earnings that you were making before this accident occurred and what you [fol. 44] have been able to earn since this accident occurred?

A. Well, there are very few places, like I just said, that doesn't handle the mail, that doesn't have any mail to handle, and of course, I could only work those jobs, and they are the choice jobs, believe me, no one likes to handle that heavy mail, and are usually always taken up by older people, and they would ask for a vacation or a few days off, or something, then I was able to work, work these, what we call easy jobs, but they were just few and far between.

Q. Have you been able to find a regular assignment since you went back to work?

A. No.

Q. After your injury?

A. No.

Q. When did you last do any work for the Texas & Pacific?

A. October 15th of last year.

Q. Have you been able to perform any work since that time?

A. No, no.

Q. Now, can you tell the jury in dollars and cents the

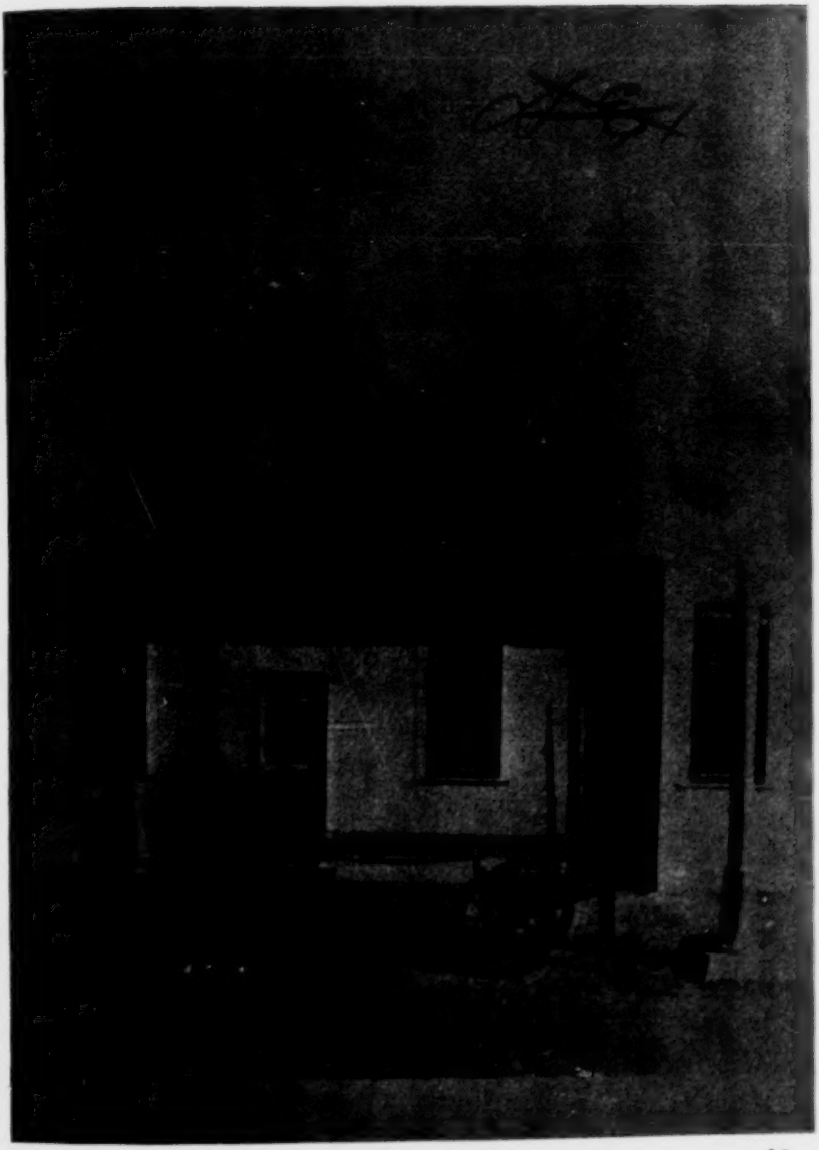
difference between your ability to earn, or what you did earn from the period, the 15th of September of 1951 until the date of your injury, then from the date of your injury for the few months following that?

A. No, Beverly; I worked right at five days a week from the time I hired out the 5th of September; it was just run here and work a few days and run down there and work a few days, and here, I worked pretty steadily; of course, I had to travel a lot but I worked very regular, and then I bid on this Monahans job, and of course, I worked there every day until—except once I had laryngitis and I couldn't speak, so if you can't speak you can't hardly [fol. 45] work over the telephone, and I was off that one day, and up until the injury.

Q. Have you been able to hold or bid for and hold any regular job since that time?

A. Well, there was one vacancy that there was no mail, and there was my seniority permitted me, and I bid on it and I received the job, but I later found out it was away out here in West Texas, and I don't have a car and there was no way to get to a doctor, and the telephone service was very bad, and the trains didn't even stop there, other than a flag, and I just thought it would be rather foolhardy to get out there in my condition and try to work that job, just because I could work the job, but there was just no one there, not even a place to live, hardly.

Defendant's Exhibit 1 36A



[fol. 47] Q. Is that the only regular position you have been able to?

A. That is the only one I bid on.

Mrs. Tarpley: Pass the witness:

Cross-examination.

Mr. Look: Would you mark this, please?

(The instrument above referred to was here marked Defendant's Exhibit Number 1, for identification.)

By Mr. Look:

Q. Mrs. Thomson, I hand you what has been marked Defendant's Exhibit Number 1.

Do you recognize what that is?

A. Uh-huh.

Q. What is it?

A. It is a regular baggage cart and mail cart of the T&P.

Q. And that is the sort you were using, is that correct?

A. Yes.

Q. Is this apparently an accurate and true presentation, picture of it?

A. Well, that is one of the ones that looks pretty good.

The Court: Let me see it.

[fol. 48] Mr. Look: We offer in evidence Defendant's Exhibit Number 1, Your Honor.

By Mr. Look:

Q. Now, how many of those carts, or trucks I believe the railroad calls them, don't they?

A. Uh-huh.

Q. Isn't that correct? Trucks? Is that what the railroaders call them?

A. Well, I suppose, yes.

Q. Well, how many of those carts were there at Monahans?

A. I don't know.

Q. Well, there was more than one, wasn't there?

A. Yes, I suppose.

Q. Well, do you know whether there were several or not?

A. No. I would say now—just surmising from what I have observed, I would say there were about three or four there.

Q. And the post office employees would bring the mail to the Monahans station from Monahans, would they not, and they would load it upon the—put it in the baggage room, is that correct?

A. Put it on the cart, or the truck, as you say, in the baggage room.

Q. And that room was locked, was it not?

A. Yes.

Q. And nobody but you and the post office department men could get in there, could they?

A. Oh, no, anyone that had one of these switch lock keys, we call them, could get in there.

Q. Now then, was there on train Number Two—that is the one you worked regularly, wasn't it?

A. Uh-huh.

[fol. 49] Q. Did they not have a baggage and a mail car combined in one car with a partition in between there?

A. I don't know.

Q. Now, this conversation that you had with your superintendent on the Western Division, in other words, from Big Spring to El Paso, didn't he say that as long as it did not interfere with your duties you could wear skirt and hose, or anything else, isn't that what he said?

A. He said that as long as it did not delay the trains or cause any delay or any hardship on the company that I could wear my skirts and hose; that he preferred that I did.

Q. Now then, the regular procedure for getting a job is that when there is a vacancy it is advertised and anyone that is qualified that works for the railroad may bid on that and the most senior one that bids on it gets the job, is that not correct?

A. That is right.

Q. And, of course, you knew what your duties would be, generally, before you moved out to Monahans, did you not?

A. Yes.

Q. And you had worked before, and had worked the mail as an operator, and that is kind of standard throughout the railroad, isn't it?

A. That is right.

Q. That the operator works the mail, and the baggage as well.

Now, then, didn't you state at one time, on March 11th, that the conversation you had with Mr. Higginbotham, your immediate superior, was about four weeks after you got on the job, the conversation you had about your working the mail?

A. I don't know just what the date was.

Q. Well, I ask you if you did not say when I took your deposition about the time——

[fol. 50] Mrs. Tarpley: What page?

Mr. Look: Page 23.

By Mr. Look:

Q. —about the time of the conversation——

The Court: It is recess time. I believe we will suspend for a five minute recess.

(Short recess.)

By Mr. Look:

Q. May I proceed, Your Honor?

The Court: Yes, you may proceed.

By Mr. Look:

Q. Mrs. Thomson, at the time of taking of your deposition did I not ask you at what time this conversation with Mr. Higginbotham took place? And you said you were to work the trains, and did you not say: "I would say a month after I got there"?

A. Well, I suppose I said that, but I am trying so hard to tell the truth, and it has been two years, and if I sound like I am being evasive I am not, I am trying so hard not to tell a lie I don't know what to do.

Q. Well, of course——

A. Well, anyway, I will try. I will say to the best of my knowledge it was about a month after I got there.

Q. All right.

[fol. 51] Now then, did you suffer any injuries to your back as a child?

A. No.

Q. Did you ever, in walking a rail fence, fall and fall astraddle of the fence with one leg on one side and one leg on the other?

A. No.

Q. Before you started to school?

A. No.

Q. Now, in school did you have any—did you at any time ever hurt your back?

A. Well, no. If I had fell across—I couldn't have had children, I have had three children normal.

Q. Your answer then is no?

A. No, no.

Q. Do you recall any instance where a schoolmate pulled a chair out from under you and you fell and hit your back on the edge of the chair?

A. Well, it doesn't stand out in my mind, no.

Q. Do you recall whether or not you ever told your husband, now your ex-husband, about these instances?

A. No, I don't remember telling him.

Q. Now then, how old were you when you first went to work for the T&P Hospital—I mean for the Texas & Pacific Railway Company?

A. I was eighteen the 6th of January and I went to work in February.

Q. And what year was that?

A. In '43. I think that is right. I think I was eighteen.

Mrs. Tarpley: Speak up, Ruby.

A. I was eighteen.

[fol. 52] By Mr. Look:

Q. Now, you became ill while you were working for them back in 1943, did you not?

A. I had my tonsils removed.

Q. You also went to the T&P Employees' Hospital in Marshall, did you not?

A. Yes.

Q. And they x-rayed your back at that time, did they not?

A. Yes, I believe they did x-ray my body, I believe is what they call it, x-raying my body. I don't think it was my back.

Q. Do you know whether or not they x-rayed your lower back region, or pelvic region, as distinguished from the upper part?

A. Yes, he took x-rays, but I couldn't say just—it was just—it was just an x-ray.

Q. Now, at that time what were your complaints? Physical complaints?

A. Well, I had this pain through my side here and around, and this ovary, he said—I had a twisted ovary was causing this, especially during my menstrual periods.

Q. And when did you get married?

A. In 1944, April 15, 1944.

Q. And when did you quit working for the railroad?

A. I believe it was May of '45—I mean May of '44.

Q. And did you have any other type of work or occupation from that time until you went back to work for the railroad in 1951?

A. Yes, I worked in a cafe downtown in Colorado City.

Q. Doing what?

[fol. 53] A. Waitress. I forget now how many—how many weeks, or if it was a month that I worked there, but it wasn't very long.

Q. And did you do anything else?

A. Yes, I worked at the Ruth Memorial Hospital about two months, that was after I did this waitress work.

Q. Then when you went back to work for the railroad you started off on the extra board?

A. Uh-huh, that is right.

Q. Now, just what is this extra board? How do you work off the extra board? Would you explain that, please?

A. Well, when you are hired and you are newly hired, such as I was, you automatically come on the extra board and you are the lowest man on the extra board, and then as you build up seniority, or other people resign or retire, well, you keep climbing up, and you can work the extra

board until a bulletin comes out that on a job, and you bid on it, and you are the highest bidder, you are the senior bidder, then you are assigned to the job, and then you are no longer on the extra board, you are a regularly assigned operator.

Q. Well, when working on the extra board you wait for a job to become vacant for a short period of time and then if your name is up you are sent to fill that job for that time, is that not correct?

A. That is right.

Q. And that fills in for people that are taking their days off, is that not correct?

A. Yes. It could just be for most anything. It could be for just one day. One time I worked just three hours. A man got sick one afternoon. It just varies.

Q. And when you are working on the extra board your work is not steady then, it is?

[fol. 54] A. Well now, mine had been, because I hired out one afternoon and they gave me my railway examination and then I just went to work that very night, they needed operators very bad, there was this vacancy, and of course, I had previous experience when I worked in Louisiana, and I went right on to work. But sometimes you have to work, but I did not, in my particular case I did not.

Q. But there would be some time between various jobs, would there not, ordinarily, and you would have to travel from one place to another one?

A. Yes, I would have to travel to all the jobs, becaus —unless I worked there at Colorado City, of course, and I did work there quite a lot.

Q. And now, where had you worked where it entailed handling baggage and mail? Mail, particularly mail, is what I am interested in.

A. Just like I say, the first twenty-five minutes I was on duty I started working mail and I worked that job, I think it was two weeks, and then I worked the mail on Number Eight and on Number Seven, both, and then—well, any place I worked that there was mail to be handled, and the train came on my shift, I just automatically handled the mail.

Usually the agent left a little list on the desk that states for any operator that is relieving temporarily or is new in the office, can read this list and he will name the duties that each operator on that shift will have to perform. And if you are new in the office you just read the list. It is usually there somewhere around the telegraph table, and he will list all the duties you are to perform, and usually it is mail and baggage if there is a passenger train on that shift that way that is your duty to perform.

Q. Well, you worked a considerable number of trains then prior to your injury?

[fol. 55] A. I worked them whenever it was necessary for me to.

Q. And it was usually necessary, wasn't it?

A. Yes, usually.

Q. Now, in relation to the amount of traffic and so forth, how about train Number Two? That is about the lightest, isn't it, with mail?

A. I don't know.

Q. Well, you worked Seven and Eight. Have you ever worked One?

A. Let's see? I believe I did out at Van Horn. I don't know. It would depend on the station that you worked, it all depends on how much mail was coming into that town as to how big the pouches or how much there is on the train for you.

Q. All right, in Monahans which was the heaviest train? Do you know?

A. I didn't work anything but Number Two when I worked at Monahans, I didn't work any of the trains.

Q. Did you ever see any other trains unloaded, even though they came in there on your shift?

A. No.

Q. And, of course, from sun up to 8:00 o'clock you said was your busiest time?

A. At Monahans, yes.

Q. At Monahans.

A. Yes.

Q. Now, it was also the busiest time for everyone else there, wasn't it?

A. Well now, I don't know; everybody seemed to be busy, if that is what you mean.

Q. Well, you referred to the people there at the station there with you. There was a man by the name of Jack Kittrell, wasn't there?

A. Yes.

[fol. 56] Q. Now, what job did he have?

A. Well, he worked with the waybills, and just clerical work there. He didn't have any connection, sir, with my work at all. I don't know just exactly what his duties were.

Q. Well, he made the yard orders, did he not?

A. I believe he did.

Q. He made up the T&NM trains?

A. I believe so.

Q. Got them ready by 8:00 o'clock, didn't he?

A. Uh-huh.

Q. Who else was on duty there with you at about 7:00 o'clock in the morning?

A. Oh, I think Slick came down.

Q. Is that Slick Sligh?

A. Uh-huh. I don't know whether he just came earlier because he is one of these industrious kind of men or he started work at that time or not, I don't know, but usually he was there.

Q. On this morning of December 3rd did you ask Jack Kittrell to help you with the mail?

A. No, no, I didn't ask Jack.

Q. Did you ask Slick Sligh to help you with your mail?

A. No. I had been instructed I was not to ask, I couldn't have anyone to work the mail with me, there wasn't any need to ask.

Q. Was there ever a-yone else that worked that mail with you?

A. Well now, all I took care of was that one cart. They told me that one cart was to be pulled out and put off and take on that is on there, and take it back and lock it up. I never noticed what anyone else was doing, I just worked and took care of my duties, and like I say, I did a lot, I usually ran and sell tickets, and handle train orders, ran

[fol. 57] up to the head of the train, and back up the cart to the train, handed up train orders to the head of the train, and one to the brakeman at the end. I was busy, I don't know what the others were doing.

Q. Do you know Jose Vasquez?

A. I might know him when I saw him, you know, I am like you, I don't remember these Mexicans' names.

Q. Actually, wasn't the duties outlined to you to assist with the mail and baggage?

A. No. Mr. Higginbotham told me, now, this is just oral, but this is what he said, the best I can remember, I was to take this one cart, this one truck, and take it out and take what is on there and put it on the train and take this on the train and bring it and put it back into the baggage room.

Q. Now, you took that to the railway post office car, did you not, or railway post office portion of the car if there was just one car?

A. I just took it to, like I say, they would say bring it here, you know.

Q. Well, there would be a railway postman in there, would there not?

A. I suppose so.

Q. An employee of the United States Government?

A. I don't know.

Q. A postal employee?

A. Like I said, before, Jack, I don't know whether he works for the government or the railroad, I never have been able to figure that out.

Q. All right, when that train would come in there would that railway post office be open?

A. Yes, he would open the door.

Q. Would the crew be in there? Would somebody be in there?

A. Yes.

[fol. 58] Q. And have mail for you?

A. Yes.

Q. Out of that R. P. O. door?

A. Yes.

Q. Now then, those sacks would vary in weight, would they not?

A. Yes.

Q. I mean a sack going to Podunk would probably not be as big as a sack going to San Francisco, would it? I mean, each one of those sacks had a tag on it, going to a different destination?

A. They wouldn't put off any there going to San Francisco.

Q. I am talking about that you might put on.

A. Oh.

Q. Or to any large town. I am trying to distinguish between a large town and a small town.

A. Well, certainly, there would be more mail for a large town.

Q. And so, some of the sacks would be quite small, wouldn't they?

A. Yes, some of them are smaller than others.

Q. Now, these sacks we are talking about are these kind of gray post office sacks that have got a drawstring through them and then a locking device with a label on them?

A. Uh-huh.

Mrs. Tarpley: Mr. Reporter, did you get her answer?

(The answer was here read.)

By Mr. Look:

Q. Do you have to handle mail at Trent?

A. No.

[fol. 59] Q. The operator?

A. No.

Q. How about at Santo?

A. Now, I believe there is a sack that is in there on the floor and you are supposed to move it into the ware room, I think, on one of the shifts, but so far as handling —getting mail, no, no, you don't have to do that, there is a postman that comes down and hangs up a little pouch and there is a truck comes and takes the rest, I think that is the way it goes.

Q. How about at Merkel?

A. In Merkel, yes.

Q. How about in Loraine?

A. No, sir, you don't handle the mail at Loraine.

Q. How about at Colorado City?

A. Yes, on first trick and third trick you handle the mail.

Q. And how about at Odessa?

A. No, the operator doesn't handle the mail at Odessa.

Q. Now then, on December 3rd you were married, were you not?

A. Yes. You mean the year 1952?

Q. In 1952.

A. Yes.

Q. What was your husband's name?

A. R. J. Thomson.

Q. What did he do?

A. He is a signal maintainer for the T&P.

Q. And since that time you have been divorced, have you not?

A. Yes.

Q. And he is still working for the T&P, isn't he?

A. I suppose so, I haven't heard anything contrary.

Q. Do you handle mail at Sweetwater?

[fol. 60] A. Well now, I never have. They have had a new ruling just recently on that. Now, I have worked the second trick there, and first and third, but you didn't have to handle the mail. But I understand since I became to where I can't work the mail that the third trick there works the mail on Seven, but I have never worked there since this come into effect.

Q. All right. How about Midland?

A. I never worked anything but the second trick—I mean the third trick at Midland, and I didn't handle the mail then.

Q. You don't know whether any other operators do or not?

A. I don't know.

Q. Now then, you talked about going to the hospital at Big Springs. Now, is that the T&P Employees' Hospital?

A. Yes.

Q. And that is owned and operated by the employees and certain monies would be taken out of your pay check each month to pay for it, wouldn't it?

A. Yes, that is right.

Q. And the same thing is true of the hospital at Marshall?

A. That is right.

Q. That you went to back in 1943, I believe it was, or '44?

A. Yes.

Q. Is that not true?

Now, out there at Monahans weren't you under the treatment of a doctor before this happened?

A. Before the—the morning I hurt myself.

Q. Before December 3rd?

A. Yes, I was going to Dr. Bell.

Q. And what was your complaint at that time?

[fol. 61] A. Well, I had to rush to the bathroom about every thirty minutes and I was having just regular kidney bother, just having to rush to the bathroom every so often, and a little stinging.

Q. And as a result of that were you passing any blood at the time in your urine?

A. No, I didn't before December 3rd, no.

Q. Of course, your back was sore, wasn't it?

A. No, not my back. It was through here, this, that soft, fleshy part, and my stomach would swell from the kidney.

Q. Now, do you know Mr. J. A. Wright?

A. Yes.

Q. Who is he?

A. Well, I think he is the Assistant Superintendent now, but I haven't seen him since his promotion; when I knew him he was trainmaster for the T&P.

Mr. Look: Mark this, will you, please, Defendant's Exhibit 2?

(The instrument above referred to was here marked Defendant's Exhibit Number 2, for identification.)

Q. I hand you what has been marked as Defendant's Exhibit Number 2, Mrs. Thomson. Is that your signature on that paper addressed to Mr. Wright?

A. Yes.

Q. And did you say in this that about November 4, 1952 I became ill with a kidney infection which made me very

sick and caused my back, sides and stomach to be sore, particularly my left side.

Did you say that?

A. Yes.

[fol. 62] Q. Now, Mrs. Thomson, after this occurrence on December 3rd there was a time when you did not work in 1952; in 1953 there was a time when you did work, wasn't there?

A. Yes.

Q. There was some question about you protecting your job, was there not?

A. Yes.

Q. And you were out of the state, I believe, were you not?

A. Yes.

Q. And for some reason did not get back, and then you were discharged at that time and a hearing was held and you were reinstated, is that correct?

A. Yes.

Q. Now, how long a time was that between the time you did not show up for work that day and when you were reinstated?

A. Well, on July 7th, as I said before, I had my accumulation days coming up and I asked Dr. Broderick couldn't I get a sick leave or something, that I was just—I was just so tired, I was just worn out, and he said that he had given me one statement before, and it had caused such repercussions over this, when I got my injury, he said, "I will ask them, but", he said, "I just can't give you any papers."

So, I asked——

Mr. Look: We object to any conversation at all she had with any other person.

The Court: Yes, don't go into the details of what they said and what she said, just tell what they did and what you did.

A. Well then——

[fol. 63] By Mr. Look:

Q. My question, Mrs. Thomson, was how long a time there was between the time that you did not show up for your job and the time you were reinstated? How long a period was that? About two months, wasn't it?

A. Oh, about six weeks. I should have reported back on duty the 14th of July and I got back the 31st of August.

Q. And, of course, you did not have any earnings for that period?

A. No.

Q. It had happened in 1953, did it not?

A. Yes.

Mr. Look: Pass the witness.

Redirect examination.

By Mrs. Tarpley:

Q. Mrs. Thomson, Mr. Look has just asked you about a statement that you made to a Mr. J. A. Wright, is that correct?

A. Yes.

Mrs. Tarpley: Mark this.

(The instrument above referred to was here marked Plaintiff's Exhibit Number 1, for identification.)

By Mrs. Tarpley:

Q. I show you what has been marked Plaintiff's Exhibit 1 and ask you if that is another copy, also signed, [fol. 64] of the same statement that he asked you about a moment ago?

A. It looks like the same, Beverly.

Q. Is this your signature at the bottom?

A. Yes.

Mrs. Tarpley: If the Court please, we offer the entire statement in evidence at this time.

Mr. Look: Your Honor, we fail to see the relevancy or materiality. The question addressed by the defense was whether she made that statement and she admitted that she

did. The remainder of the statement can have no bearing on this case; it is a self-serving declaration; the only purpose——

The Court: Ordinarily, we don't take, for instance, the deposition and the witness' oral testimony at the same time. If there is a written statement from the witness, the matter would probably be limited to those bearing on something else that has been said and done.

What is the purpose of it?

Mrs. Tarpley: If the Court please, Counsel has had this statement, the original of the statement, marked and has asked the witness about one sentence out of it and has read that one sentence to the jury. We believe under those circumstances we have a right to introduce the entire instrument.

The Court: Let me see the sentence and the paper? What was the paragraph you read?

[fol. 65] Mr. Look: It was the first sentence of the second paragraph, Your Honor, and we don't believe the rest of the statement has anything to do, or in any way explains that first sentence.

Mrs. Tarpley: If the Court please, the plaintiff makes a statement in the rest of that statement that she definitely injured her back on December 3rd.

Mr. Alvis: Just a minute. Your Honor, we object to counsel making a statement like that in the presence of the jury. We would rather the witness testify.

The Court: Let me read it.

We have ruled here, during the present time, that a statement of this kind would not be admissible but when both sides know and ask for it to be admitted we would let it in, but if both sides want this in I will admit it. I think that the part that has been read was permitted as an admission, so to speak, against interest, and was admitted for that purpose. Every other fact in here that is helpful to the plaintiff she may now testify to by direct examination without reading the paper.

Mrs. Tarpley: If the Court please, however, I believe that statement was prepared by a representative of the defendant, and we feel that since one limited portion of the statement has been offered, in the nature of a declaration

against interest, we are entitled to a fair showing of the entire statement that was made by the plaintiff at that [fol. 66] time to the defendant. It is under date of January 29, 1953, less than a month after this accident occurred. We think we are entitled to show the entire statement made by the plaintiff to the defendant at that time.

The Court: Well, if you want to ask her and let her testify now to the substance, or other facts, or the statements made by her in this paper you may do so, but I don't think that good practice allows a person to write out a statement and then for it to be read in evidence, and then testify also.

Mrs. Tarpley: Note our exception.

By Mrs. Tarpley:

Q. Now, Mrs. Thomson, do you recall the occasion on which this statement was taken?

A. Yes.

Q. Where were you at the time this statement was taken?

A. In the superintendent's—well, the assistant superintendent's office in the Big Spring T&P Building.

Q. Is that the Assistant Superintendent for the T&P Railroad?

A. In Mr. Lee Conroy's office.

Q. That was Mr. Lee Conroy?

A. Yes.

Q. Did you type this statement yourself?

A. No.

Q. By whom was the statement typed?

A. I believe Mr. Barber Hughes, the chief clerk for Mr. Foster typed it.

[fol. 67] Q. What was Mr. Wright's position at that time?

A. He was trainmaster.

Q. And the statement was directed to him, is that correct?

A. Yes.

Q. Now, at that time did you tell them about this kidney infection that you had had?

A. Yes.

Q. Did you tell them about any other ailments that you were suffering from, or any other injuries that you had had?

A. I told them about how my back was hurt, that was why I went; it is required of all employees, as soon as they find out they have been injured, to make out one of these injury reports, and this was what we were doing. I was telling them how and when and where I was hurt.

Q. And did you tell them that you were hurt on December 3rd of 1952?

A. Yes.

Q. And did you tell them how you were hurt at that time?

A. Yes.

Q. What did you tell them with reference to how you were injured?

A. Well——

Mr. Alvis: Just a minute.

Your Honor, that would be repetitious. She has already testified about what happened out there at Monahans.

The Court: I believe I will just, to get away from this snag here, let you offer that paragraph, the balance of the paragraph, which relates to the complaint that is referred to, but there are two or three other paragraphs that re- [fol. 68] late to other matters there as though they were written at a different time at a different place, where you said—take up right where that was left off and read the balance of the paragraph.

Mrs. Tarpley: Thank you, Your Honor.

PORTION OF STATEMENT BY RUBY NELL THOMSON

"About November 4, 1952, I became ill with a kidney infection which made me very sick and caused my back, sides and stomach to be sore, particularly my side. Dr. Bell at Monahans treated me for this, giving me medicine, etc. On December 3, 1952, while I was handling baggage and newspapers off train No. 2 at Monahans, I was feeling very badly, but I continued to work and unloaded a suitcase or two and fifteen or twenty bundles of newspapers and magazines, then when I finished I got down on the

ground and started to move the mail truck to the other car, to see if there was mail to go on it. Just as I put my weight against the handle of the truck to move it my back hurt very badly. I continued to work until 8:00 a. m. (this having occurred about 7:30 a. m.) and went home and went to bed. On December 5, 1952, which was one of my rest days, I got up to get dressed to go to town and see my lawyer and go to the beauty shop while I was doing this I passed out and later was taken to Dr. Bell's office, where Dr. Bell had me placed in hospital and treated me for several days, leaving hospital Tuesday, December 9th about noon and went home and stayed in bed for four or five more days. Gradually I began to feel better and able to be up most of the day and even do a little shopping. On December 27, 1952, I got to feeling very badly again and called Dr. Bell who told me that he believed it would be [fol. 69] better for me to go to Big Spring for treatment in the hospital at that point."

That is the balance of the paragraph, as I understood it, Your Honor.

The Court: All right.

By Mrs. Tarpley:

Q. This statement is dated January 29, 1953. Is that the date on which the statement was made?

A. I suppose. That is my signature, and I am sure the rest of it is right. I don't remember the exact date.

Q. Now, you were married at the time this accident occurred, were you not?

A. Yes.

Q. Were you living with your husband at that time as husband and wife?

A. No.

Q. How long had you been separated prior to this injury?

A. Since October 5th of '52.

Q. Were you subsequently divorced from R. J. Thomson, Jr.?

A. Yes.

Q. When were you divorced?

A. Well, the final judgment was January 20, 1954.

Q. Now, since the date of that divorce judgment where have the children of yourself and R. J. Thomson been living?

A. Up until June of last year they were with my aunt. And with both of our consents she was to keep them until school was out, and I went and got them and they have been with me since last June 13th.

[fol. 70] Q. June of 1954?

A. '54.

Q. Since the time that those children have been with you has their father contributed to their support?

A. Yes.

Mr. Alvis: Just a minute.

Your Honor, I think that would be irrelevant and immaterial, as to whether the father had contributed to the support of the children. It has no bearing in this case.

The Court: That mat-er is raised in the pleading. We might as well have your views on the law now.

Under certain conditions a wife may dispose of property when a husband is not supporting her; and under certain conditions she may deed property with permission of the district judge; and various privileges of hers.

I want to ask the views of counsel as to what disposition can be made in this trial of the husband's interest in this lawsuit, if any he has?

Mrs. Tarpley: If the Court please, it was for that purpose that he was made an involuntary plaintiff. He has been joined and he has been properly served and brought before this Court and is now subject to the jurisdiction of this Court by proper service. He has been made an involuntary plaintiff because we believe under the state of law he must—his interest must be adjudicated.

[fol. 71] However, it has been our contention, and it is my intention now in developing this testimony to show that he has abandoned this cause of action, that he has refused to prosecute this cause of action, and that he should have no interest in this case of action, by reason of his abandonment not only of the cause of action, but of plaintiff herself and of the children.

The Court: Well, what the Court wanted to know, perhaps you might cover further as to what disposition, what

paragraph or declaration should be inserted in the judgment disposing of him?

Mrs. Tarpley: If the Court please, we believe that the judgment should contain a finding that the involuntary plaintiff, R. J. Thomson, Jr., has abandoned this cause of action and any interest he might have in the cause of action by his failure to prosecute same, or his failure to assert any interest in it whatsoever, and therefore, that he has abandoned any claim which he might have to this cause of action.

The Court: All right, Counsel.

Mr. Look: Your Honor, we plead ignorance, we do not represent the involuntary plaintiff, at least not as of yet, and frankly, I am at a loss exactly what——

The Court: You are not sufficiently informed to either affirm or deny?

[fol. 72] Mr. Look: That is right, sir.

The Court: All right. We are inclined to accept and adopt—accept the law as stated by plaintiff's counsel.

Mrs. Tarpley: If the Court please, then may we continue our line of proof as to the action of the involuntary plaintiff since the separation?

The Court: All right. That is a little unusual title for a plaintiff, but we understand what he is.

Mr. Look: Your Honor, we do not want to be caught in the position of agreeing it is correct; however, the specific objection made was as to the support of the children by the husband, we feel that is immaterial and of no relation to any issue in this cause.

The Court: Well, it might be considered an act on his part that would, could show his interest in the estate, and that half of this lawsuit was a part of that estate, and therefore, he might be called on to contribute to the children. I think we might, if it is true he has not contributed to the children, that that fact should be in the record.

By Mrs. Tarpley:

Q. Since the children have been with you, Rubynelle, has their father, R. J. Thomson, Jr., contributed to their support?

[fol. 73] A. No, not at all.

Q. After December 3rd of 1952 did he contribute any to your support prior to the actual granting of the divorce?
A. No.
Q. After this cause of action was filed did you, through your attorney, contact your ex-husband about this lawsuit?
A. This one?
Q. Yes.
A. Yes.
Q. And have you received any reply or any word from him at all concerning this lawsuit?
A. No.

Mrs. Tarpley: Pass the witness.
Mr. Look: No further questions.

Dr. W. A. V. Cash, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mrs. Tar-ley:

(Instruments were here marked Plaintiff's Exhibits Numbers 2, 3, 4, 5, 6, 7, and 8, for identification.)

Q. Would you state your name, please?
A. W. A. V. Cash.
Q. And what is your profession, sir?
A. I am a doctor.
Q. Where do you practice?
A. In Abilene, Texas.
[fol. 74] Q. How long have you been practicing here at Abilene?
A. At Abilene 45 years.
Q. Is your license to practice medicine duly recorded in the office of the District Clerk of Taylor County, Texas?
A. It is.
Q. Outline briefly for us Doctor, the nature and extent of the training you have, and schools you have attended?
A. I graduated from the Medical Department of Baylor University, 1909, June 1st, and I served one year's intern-

ship in Baylor Hospital in Dallas, from June 1, 1909 to 1910.

Moved to Abilene and located, moved in 1910 and have been here continuously, with the exception of World War I and a year in World War II.

Then, I have had postgraduate work about every two years during that period of time, with the exception of the time I was in the army, and I have taken my postgraduate work in either New York, New Orleans, Boston, the Mayo Clinic, and the last postgraduate work I had was in January 1953 in New Orleans.

Q. Do you have a general practice, Doctor, or do you specialize in some particular field?

A. No, I am a general practitioner.

Q. Did you have occasion to see Mrs. Rubynelle Thomson on or about the 6th of December, last year?

A. December 3rd was the date of the examination.

Q. December 3rd. And that is the lady sitting here behind me?

A. That is true.

Mr. Alvis: What year?

[fol. 75] By Mrs. Tarpley:

Q. 1954.

You examined her at my request, is that correct?

A. I did.

Q. Will you state to us what the examination consisted of?

A. The examination consisted of two parts, physical and x-ray.

The physical examination was a general physical. First I examined her eyes, to test her reflexes to see if they were normal, and then her chest, her heart, blood pressure, and then a view of her back, of course, undressed and draped, my nurse undressed her and draped her and then visualized her back to determine whether or not there were any gross abnormalities.

And then a series of x-rays were done, in a prone position, lying on her back, with her legs held stiff, the knees stiff, to attempt to raise the entire leg as much as you could with my hand under her back, to determine whether—

how much spasm or tenseness there was to the muscles of the lower back. That was done both to the right and left leg.

And then in an erect position, forward bending, backward bending, right to left and left to right was done, and at all times with my hands on her back, to determine, or to evaluate the amount of muscle tenseness or muscle spasm that she suffered during these exercises.

And during the exercises in the prone position she was only able to do about twenty-five per cent of the normal raising each leg, about twenty-five per cent, and at that time, during that attempt, there was a marked muscle [fol. 76] spasm in the lumbar region, that is the lower back.

Q. Doctor, would you tell us what you mean by a muscle spasm?

A. Tenseness, in other words, a normal muscle, the muscle is smooth and soft, and then in a spasm or tenseness it is just as tense as can be.

Q. Is that something you can see or feel——

A. I can feel.

Q. —Doctor?

A. Yes.

Q. Go ahead then, please.

A. Then during the exercises in an erect position she was only able to do twenty-five per cent of normal both in the forward bending and backward bending, right to left, left to right, and there was muscle spasm again during this exercise.

And, subjectively, I mean, that is what the patient tells the doctor, or what she told me, that pain—that the reason she could not do it normally, that pain was too severe, that she could only go so far and the pain became so severe she could not do it further. That was the extent of the physical examination.

Then, in my presence and under my direction, a series of x-rays were made of her spine and pelvis on that same date. The films were made in the Shoultz Laboratory, the building, 1101 North Nineteenth, in my—under my direction, in my presence.

I left out one part of the physical examination. That was pelvic examination. Visualize the pelvis, and then

a manual examination of the pelvis, outlining the uterus or the womb, and I was unable to outline her ovaries, and [fol. 77] the uterus was smooth, small, and no trouble that I could tell.

I, however, had the feeling, due to the smallness of it, and at her age, that she was in an early menopause, or was having an early menopause.

Q. Other than this condition you have just told us about, Doctor, did you discover any abnormalities or irregularities through your physical examination, other than this muscle spasm in the back?

A. That is all, in limitation of her ability to do exercises.

Q. Do you have with you, Doctor, the x-rays that were made by or under your direction?

A. I do.

Q. Doctor, we have what is marked as Plaintiff's Exhibit 2.

A. Here is a film made of the upper spine, and in this position with her on her left side with the x-ray tube above and with the x-rays passing from side to side. In other words, from the left side to the right side. And, showing the bodies of the vertebrae in the dorsum spine. Showing some arthritic changes, and in the dorsal vertebrae, and also a narrowing of the interspace or intervertebral space between the ninth and the tenth dorsal vertebrae.

Q. Now, Doctor, is this the area above the waist line?

A. That is above.

Q. Above?

A. That is from the neck down to the waist line.

Q. All right.

A. Number 3.

Q. Now, Doctor, we have Plaintiff's Exhibit 3.

Would you tell us what portion of the body that represents?

[fol. 78] A. That is the same portion of the body, except this is made, the film was made with her lying on her back and the x-ray tube centered above and the x-rays go from front to back rather than from side to side, and shows all the upper spine, as well as the ribs.

And in this film there is noted a sclerosis or a bending towards the right of the upper vertebrae in the dorsal region, particularly of the fourth and fifth dorsal. The only

other abnormality noted is a marked narrowing of the intervertebral space between the ninth and tenth dorsal vertebrae.

Q. That is the same area that you pointed out to us on the previous x-ray?

A. That is right.

Exhibit Number 4.

Q. Now, we have plaintiff's Exhibit Number 4.

Would you tell us what portion of the body that is?

A. This is a lower back, I mean, beginning with the end of the ribs, and the first lumbar vertebra, there being five lumbar vertebrae in the normal individual, or a first, second, third, fo-rth and fifth lumbar vertebra, a part of the pelvic bones, and we notice some arthritic changes throughout the lumbar spine, but the space between the fourth and fifth lumbar vertebra is completely, posteriorly, it is completely obliterated.

Q. Normally, Doctor, what is between each one of those lumb*ar vertebrae?*

A. There is a disk made of—it is of connective tissue, it is a pad to keep the vertebrae from touching one on the other, it is just a heavy pad that we call an intervertebral disk. Posteriorly, between the fourth and fifth, it is completely out posteriorly.

Now, this is a film——

Q. Is this Plaintiff's Exhibit 5, Doctor?

A. Five, I am sorry.

[fol. 79] This is a film made of the same area with the patient on her side, left side, with the x-rays going from side to side, rather than from front to back, showing the first sacral, the fifth, fourth, third, second and first lumbar.

And the only abnormality noted is particularly the intervertebral space between the fourth and fifth lumbar vertebrae, the spaces above this, as you will see, now, these are normal, and then the space between the fourth and fifth, you will see that there is very little space anteriorly, and no space at all posteriorly. Then there is a slight dislocation of the first sacrum posteriorly, as in its relationship with the fifth lumbar vertebra.

Q. Now, Doctor, before we leave that x-ray, assuming that a woman, 29 years of age, the plaintiff in this case, the woman you examined, was employed on the 3rd of De-

cember, 1952 in lifting mail sacks weighing fifty to seventy-five pounds apiece; she was standing on a cart and picking up each mail sack and then tossing it over on to the floor of a baggage car some eight or ten inches away, and then picking up bundles of newspapers and magazines and putting them back on the cart; dropping down off the cart some three or four feet off the ground and then pushing a railroad cart, in your opinion, assuming that that patient was suddenly struck by a pain as she started to push the cart, in your opinion, could such a series of accidents produce an injury of the type you have described?

Mr. Alvis: Just a minute.

We object to that hypothetical question there because it does not embrace the facts that have been brought out here in the testimony.

[fol. 80] In addition to that it embraces facts that have not been brought out in the testimony, and in addition to that it calls for conclusion as to the possibility of such a thing, and not reasonable probability.

And the question is entirely improper and misleading to the jury, and we object to his answering such question.

The Court: I might ask the plaintiff, and if there is a controversy about it we will have to ask the question over, are you inquiring and embracing in your hypothetical question any statement of the evidence that has not been offered?

Mrs. Tarpley: If the Court please, I am attempting to quote the plaintiff's testimony that has been brought before this Court. If I am in error it is entirely unintentional. I am trying to quote the plaintiff's testimony.

The Court: Now, are you inquiring as to the probable result of the possible results?

Mrs. Tarpley: The probable result, Your Honor.

The Court: All right, make your question to read the probable result.

Mr. Alvis: Your Honor, we still urge our objection on the same grounds as stated, because it is our contention that it does embrace additional facts that are not included [fol. 81] in the testimony, and does not embrace all the facts that are included in the testimony.

The Court: Do we understand, Counsel, that you intend

to do now assure the Court that from other witnesses and testimony that you will have such matters in the record as you are now inquiring about?

Mrs. Tarpley: If the Court please, from counsel's objection I can't tell which facts he is alleging we have not proved. I am attempting to paraphrase what the plaintiff has already testified to, what is before this Court. If I am in error in any particular fact if counsel will point it out perhaps we can straighten it out, but I do not profess to have a perfect memory, but I am doing the best I can to keep within the bounds of what has already been put before this Court.

The Court: I am unable to say just what you are embracing in your question that has not been introduced.

You might point out something, Counsel?

Mr. Alvis: Judge, there are numerous statements there. For instance, he had this girl lifting bags of certain weights, and so forth, then he had her pushing a cart; there is no evidence in here on that.

Mrs. Tarpley: If the Court please, I believe that the plaintiff testified—of course, we are arguing about what has been said and what has not, but if the Court please, [fol. 82] I believe that the plaintiff testified that she believed that some of those mail pouches weighed from fifty to seventy-five pounds, and testified she felt a sharp pain in her back as she got down off the cart and started pulling.

The Court: I think that statement was made. I don't remember it being challenged. I will let you question——

Mr. Alvis: Will the Court note our exception, please?

The Court: Yes, that is right.

By Mrs. Tarpley:

Q. Now, Doctor, assuming the facts that I outlined a moment ago, could such a series of accidents, did it in all reasonable probability result in the condition which you note in this x-ray here?

A. It certainly would.

Number 6.

Q. You have here Plaintiff's Exhibit Number 6.

Would you tell us what that is, Doctor?

A. This is a film made just of the lower back. This is what we call the spot film, or a lumbosacral film, changing the cone on the x-ray to get a smaller cone, just to get down to the fourth and fifth lumbar vertebrae and the sacrum, and to get, try to get more detail than a larger cone will give.

[fol. 83] And in this film we see the same thing we saw in the previous film, that the space, posteriorly, between the fourth and fifth lumbar vertebrae is completely obliterated.

Q. What position was the patient in?

A. I am sorry. This is an AP film, with the patient on her back, with the x-ray passing from front to back.

This is Exhibit Number 7.

And this is made in the lateral position with the patient, with the same cone, just trying to get this particular area, with the patient on her left side, with the x-ray going from side to side rather than from front to back, showing the first sacral, the fifth, fourth and part of the third lumbar vertebrae.

The intervertebral space between the third and fourth is entirely normal; and the intervertebral space between the fourth and fifth is very narrow anteriorly and completely obliterated posteriorly. It has the appearance, and which I am sure you can see, that the posterior, the body of the third—of the fourth, is resting on the body of the fifth, and also a posterior displacement of the first sacral. That is what I am pointing at now.

This is Number 8.

This is a film made of the pelvis, using our large cone again, and getting the heads of the femurs, or of the thigh bones, and the end of the spine, or the coccyx, with the fifth and the fourth, and it shows the same thing that the others have shown, with the exception it shows the left side of the pelvis to be higher than the right, and which is easily seen. This is at the top of the pelvis on the right, [fol. 84] and it is markedly higher on the left; that is about all there is in that film.

Mrs. Tarpley: We offer these in evidence, if the Court please.

By Mrs. Tarpley:

Q. Now, Doctor Cash, you have shown us throughout these x-rays what, in your opinion, is a, oh, complete loss of the disk between the fourth and the fifth vertebrae.

Can you describe this disk to the jury?

A. As I said awhile ago, it is a heavy—just a pad, tough as can be. It is more like a shock absorber; nature put it there, or the Good Lord put it there to keep the vertebrae apart to keep one riding on top of the other.

Q. What is the effect of one vertebra riding on top of another?

A. Pain constantly.

Q. Constant pain?

A. And limitation of motion. You can't do the normal things that you could with the disk in.

Q. In your opinion, Doctor, is the condition that you noted in these x-rays a permanent one?

A. Yes. I will answer that question in this way, that it is permanent at present—it is total at the present time. However, I think with a fusion operation—I mean by fusion, putting a splint and the bone on each side of the fourth and the fifth lumbar vertebrae, taking the weight bearing off of the fifth and putting it on the sides, that it would cut her disabiltiy from a total disability to twenty-five to fifty per cent.

Q. Now, Doctor, what is the normal recuperative time for a fusion operation?

A. About a year.

Q. I see.

[fol. 85] A. I am not an orthopedic surgeon, but orthopedic surgeons give them a total temporary disability of approximately fifty-two weeks, after which time they can resume work with a disability of about twenty-five to fifty per cent.

Q. In your opinion, then, Doctor, is this fusion operation of which you have spoken the only possible treatment to reduce the disability you now find?

A. It is.

Q. And with the fusion operation it would mean a recuperative time of approximately one year?

A. One year.

Q. Now, what are the possibilities of suc-ess with an operation of that type?

A. Very, very successful now.

Q. Very successful?

A. In the hands of othopedic surgeons.

Q. In your opinion, Doctor, if the fusion operation is not performed will this condition become worse or would it become better?

A. I think it will become progressively worse and she will be bedfast, or at least confined to a chair in the future.

Q. Doctor, i*t* it true that the spinal cord runs down this bony substance you point out in the x-ray?

A. That is, from the brain down the spinal cord, down the spinal column, and giving off branches all the way down to different parts of the body. And the spinal cord ends, of course, a little higher up than the fourth, but it still sends off branches down, it comes out the side of the spinal column into the thigh, into the back and into the lower abdomen, and into the legs.

Q. And what, if any, effect do you think this loss of the disk between the two vertebrae will have?

A. Just constant pain and inability to do normal work.

[fol. 86] Mrs. Tarpley: Pass the witness.

Cross-examination.

By Mr. Look:

Q. Doctor, let's have Number 4?

A. It will be the——

Q. The AP of the lumbar.

A. The AP of the lumbar. That is right.

Q. Doctor, what is this vertebra?

A. Number 5.

Q. And do you see anything else abnormal about L-4 or L-5 other than——

A. Arthritic changes, yes.

Q. And nothing else?

A. Except the loss of the intervertebral space between the fourth and fifth and some arthritic changes.

Q. Do you see any congenital anomalies?

A. Oh, yes—no, that is down in the first sacral, have a failure of fusion of the neural arch.

Q. And state the effect of that, Doctor?

A. None. It is of no effect.

Q. And do you see any other abnormalities or anomalies?

A. No, sir.

Q. On any of your pictures?

A. No, sir.

Q. This L-4 or this L-5, other than narrowing of the space?

A. And the arthritic changes.

Q. Now, the arthritic changes, what do you mean by arthritic changes?

A. Arthritic changes are characterized by lipping and spurring, which is changes shown better in the lateral, [fol. 87] than AP, but you can still see some arthritic changes in 3, 4, and 5.

Q. She had this all up and down her spine, did she not?

A. Dorsal and lumbar, yes, sir.

Q. That is from here, roughly here, on down, is it not, Doctor?

A. That is correct.

Q. And was that due to this injury, Doctor?

A. No, I don't think so.

Q. And now, what will arthritis of the spine do?

A. Pardon me?

Q. That is arthritis of the spine, isn't it?

A. Yes.

Q. And what effect does that have upon a person?

A. Well, as a rule, all of us have some degree of arthritis, and until we get an injury, why, we go along and live normally, and get an injury and with arthritis it makes it a lot worse, and becomes incapacitated.

Q. Of course, Doctor, your diagnosis is based upon your findings from the x-ray pictures?

A. And the physical examination.

Q. And the physical examination?

A. That is correct.

Q. And from the history that the patient gave you, is it not?

A. No, I did not take into consideration the history she

gave, at all. I just took into consideration my physical examination and my interpretation of the x-rays.

Q. Doctor, is this an injury in here, does this denote an injury?

A. I think it is an aggravation, it is an injury and a marked aggravation of a pre-existing condition. By that I mean she had arthritis, I will say she—I am sure she had arthritis when the accident occured, but assume she [fol. 88] did her work normally when the accident occurred, she had no disability, and the accident was and is the cause of the disability.

Q. And, in other words, there was something wrong there before she ever——

A. Oh, yes, she had arthritis, I am sure, before; of course, it was two years from the date of the accident until the time I examined her, but I think she had arthritis before that time.

Q. That is, of course, assuming there was an accident on December 3, 1953, isn't it, Doctor?

A. That is right.

Q. That accident could have happened, so far as you know, at any time, could it not?

A. At any time. I don't know.

Q. It could have happened ten years ago, couldn't it, Doctor?

A. That would be—it could, yes, but that is a little far fetched to say ten years ago, but it could, I will say that.

Q. And if there were an abnormality existing there could it not have been an old injury and the other abnormality existing there aggravate the old injury until it becomes disabling?

A. Yes, that is just what I said, that I think the old arthritic condition, and then an injury——

Q. Doctor, I am talking about assuming that there had been an injury many years ago, plus the arthritis; could the arthritis have aggravated the injury and thus caused that situation?

A. Well, I don't know. I don't quite understand the question?

Q. Well, Doctor——

A. It isn't clear.

Q. Let me phrase it this way——

[fol. 89] A. All right.

Q. Mrs. Thomson had arthritis about that vertebra, did she not?

A. Oh, yes, definitely.

Q. Now, suppose before the arthritis ever started, say ten or fifteen years ago, there had been an injury. Could the arthritis cause this spinal——

A. No.

Q. —fusion?

A. I don't think so at all; it could be aggravated, cause an aggravation.

Q. And the arthritis then could aggravate an old injury to where it would be painful, couldn't it?

A. Oh, yes, it could.

Q. As a matter of fact, that often happens, doesn't it, Doctor?

A. Sometimes.

Q. Doctor, did Mrs. Snow give you any history of any kidney trouble?

A. Mrs. Whom?

Q. Mrs. Thomson, I am sorry.

A. Yes, at the time of the accident her history, she stated she had cystitis, that means inflammation of the bladder, and that her doctor told her she had pus and blood and mucus in the urine.

Q. Did she give you any history of any other back trouble?

A. No, she did not.

Q. And if she had told you she had had back trouble some years beforehand would that have influenced your opinion at all?

A. No, it would not, for this reason, as I said awhile ago, assuming—I will admit she had the arthritis, and assuming she had been able to do her work and do it normally prior to this time in December, 1952 then I [fol. 90] would say that the accident precipitated, or was the cause of her disability.

Q. That is assuming there was an accident, isn't it, Doctor?

A. Yes, that is assuming there was an accident.

Q. Now, Doctor, how far is normal in leg raising? How far can you normally raise the leg?

A. Oh, up to a level of your body.

Q. In other words, you can make—a normal person can get their leg on back?

A. Oh, yes, normal, on a body level.

Q. How far can you bend side to side?

A. Side to side, normally, you can merely do—you can touch your ankles.

Q. Normally, how far can you bend front to back?

A. Forward, a lot of individuals can touch the floor; then backwards about up to the body level.

Q. And that varies with individuals, does it not?

A. Oh, yes, that varies with individuals.

Q. Some persons can touch the floor and other persons can hardly get down on their knees, isn't that right, Doctor?

A. That is right.

Mr. Look: That is all.

Redirect examination.

By Mrs. Tarpley:

Q. Doctor, if the injury which produced the disability, the present disability which you found, had been ten years old, could Mrs. Thomson have been lifting anything that weighed as much as fifty or seventy-five pounds?

A. She could not even twenty-five pounds.

[fol. 91] Mrs. Tarpley: That is all, Doctor.

Mr. Look: That is all.

Mrs. Tarpley: Thank you very much.

Mrs. A. A. Taylor, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mrs. Tarpley:

Q. You were sworn this morning, were you not, Mrs. Taylor?

A. Yes, ma'am.

Q. Would you state your full name, please?

A. Mrs. A. A. Taylor. Is that the way you want? Or Mae Taylor.

Q. That is fine. Speak out loud enough so all these ladies and gentlemen can hear you, Mrs. Taylor.

Where do you live?

A. Monahans.

Q. And how long have you lived in Monahans?

A. Well, off and on ever since '35.

Q. Are you married?

A. Yes, ma'am.

Q. Are you yourself employed?

A. No ma'am.

Q. Regularly employed?

A. I am not.

[fol. 92] Q. By whom is your husband employed, Mrs. Taylor?

A. T&P.

Q. How long has he been employed by the T&P?

A. Oh, close to eleven years.

Q. Do you know Rubynelle Thomson, the plaintiff in this case?

A. Yes, ma'am.

Q. How long have you known here?

A. Oh, let's see? In '53, November.

Q. November of——

A. '53.

Q. All right. And where did you first meet her?

A. At Monahans.

Q. And was she living in Monahans at that time?

A. Yes, ma'am.

Q. All right, was she working?

A. Yes, ma'am.

Q. What was she doing at that time?

A. Working for the T&P.

Q. In what capacity? Do you know?

A. Well, I don't know. She was there at the depot, but really, operator, or something or other, I don't know much about the railroad myself.

Q. This was actually '52 rather than '53, wasn't it, Mrs. Taylor?

A. Well, let's see? It was in November. Maybe it was '52, but I wouldn't swear to that now. It hasn't been too long ago.

Q. Did Rubynelle have occasion to come and live with you at your house?

A. Yes, ma'am.

Q. And what was the—or, let me ask you whether she was living there as a member of your family or as a boarder or what?

[fol. 93] A. Well, she was there just kind of taking a room there.

Q. Taking a room there.

All right, how long had she lived with you prior to the time that she got hurt?

A. Oh, approximately a week or ten days, something like that.

Q. During that time, that week or ten days, had she been working regularly?

A. Yes, ma'am.

Q. Did she get up and go to work every morning?

A. Yes, ma'am.

Q. Did she ever complain to you about suffering any pain or not being able to do anything?

A. No.

Q. Did you see her on the morning of December 3rd when she came in from work?

A. Well, no, I didn't see her that morning.

Q. You didn't see her that morning.

She normally worked from 12:00 Midnight until 8:00 o'clock in the morning, did she not?

A. Yes, ma'am.

Q. Now, when was the first time you saw her after she got off on that morning of December 3rd?

A. Well, to make that clear, I was working at the time from 5:00 until 1:30 in the morning. In the day. I go at 5:00 in the morning. I would leave the house. She would come in and go to bed and I didn't see her until after she got up in the afternoon, or some other——

Q. Did you see her then in the afternoon of December 3rd?

A. Yes, I saw her on December 3rd in the afternoon.

Q. And that was there at your house, is that correct?
[fol. 94] A. Yes, ma'am.
Q. Did you have any conversation with her about her work the night before?
A. Well, yes, I did.
Q. And did she say anything to you about her duties the night before?
A. Yes.
Q. What did she say to you?

Mr. Alvis: Just a minute.
Mr. Look: Your Honor, we object on the grounds any statement would be hearsay to this defendant.
The Court: I am inclined to think the objection is well made, Counsel. We will hear from you.
Mrs. Tarpley: If Your Honor please, this is a statement made by the plaintiff directly to this person. I think she is entitled to testify as her own personal knowledge.
The Court: As I understand it, you seek to learn from this witness what it was that the plaintiff said to her?
Mrs. Tarpley: That is correct, Your Honor.
The Court: We don't think that would be admissible.
[fol. 95] Mrs. Tarpley: Very well, Your Honor. Note our exception.

By Mrs. Tarpley:

Q. How long did Rubynelle remain in your house after that?
A. Well, she was only there about something like a couple of days and then she went to the hospital.
Q. Did she ever return to your house?
A. Yes.
Q. After that?
A. She was back to my house.
Q. Approximately when did she return from the hospital?
A. It was a week or ten days, something like that, I believe.
Q. And what did she do there at your house when she returned from the hospital?
A. Well, she was just kind of convalescent, getting ready to go back to work.

Q. Did she do any sweeping?

A. No.

Q. Or bed making?

A. No.

Q. Did she remain in bed during any part of the time?

A. Yes, ma'am.

Q. And approximately how much of each day did she spend in bed?

A. Well, you know, a fellow running rooms don't check close, but she was in her room and around the bed most of the time. I never saw much of her.

Q. When she last left your house where did she go then?

A. Well, just rough off, I believe she went to Big Spring Hospital, they sent her there.

[fol. 96] Q. And she has not returned to your house as a roomer since that time, is that correct?

A. No.

Q. Now, before this injury occurred, Mrs. Taylor, did Mrs. Thomson have occasion to spend any time in bed except when she was sleeping after her day's work or night's work?

A. Well, I never did notice anything in particular, if she ever did spend any time in bed, because by the time I come in she had gotten her sleep, mostly, and was up and about the place then.

Q. Did she remain up and about the place up until she went to work?

A. Yes.

Q. And did she do that every day before this accident occurred?

A. Yes, ma'am.

Q. Now, when you came home on the afternoon of December 3rd, without relating any conversation between you and Mrs. Thomson, will you tell the Court and jury what she was doing when you got home and what you observed about her condition when you got home?

A. Well, she was in bed, and just apparently was not able to get about, and was worn out.

Q. Was she normally still in bed at that time of day?

A. No.

Q. She was ordinarily up,

Just tell us, Mrs. Taylor, what difference you observed. Now, I am asking you what you yourself could see, not what anybody told you or anything, but what difference could you see in Rubynelle's appearance, and, oh, activities, before this accident occurred and after this accident?

[fol. 97] A. Well, she just was apparently sick, and was not able to get about and do things as she had been before, because she didn't usually take as much rest, and would be up and ready to go in the afternoon, or something like that, and afterwards she spent her time at home in bed.

Mrs. Tarpley: Pass the witness.

Cross-examination.

By Mr. Look:

Q. You rented her this room, did you, Mrs. Taylor?

A. I did what?

Q. Did you rent Mrs. Thomson the room?

A. I sure did.

Q. And what time would you get home from work?

A. Well, it was on a job, I would usually be home by 2:00 o'clock, but sometimes it was 5:00.

Q. And then Mrs. Thomson worked at night, didn't she?

A. Yes, sir.

Q. And you went to work awful early. What time would you generally retire about that time?

A. You mean what time I would go to bed?

Q. Yes, normally, during that time, to get up at 5:00?

A. Well, that was kind of according to what hours my husband was working and how much home work my son had to do, and keeping my house, I did that according to what I had to do.

Q. You said before this Mrs. Thomson never complained of any physical discomfort or disability?

A. No, sir, she never.

[fol. 98] Q. Were you very friendly with her?

A. Yes, we were friendly. She usually took her evening meal outside.

Q. You never noticed anything unusual about her behavior?

A. No, nothing about her behavior. She was a perfect lady.

Q. I mean about feeling bad or anything?

A. Oh, no, nuh-uh.

Q. That is what I had reference to by behavior.

A. No, no, her health was——

Q. Do you know whether or not she was treated for any type of kidney ailment while she was there?

A. No, I don't know nothing about that if she was.

Q. You don't know if she had a backache or anything else beforehand?

A. She never complained of nothing.

Mr. Look: Thank you. That is all.

Mrs. Tarpley: That is all, Mrs. Taylor.

Joe Smith, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mrs. Tarpley:

Q. State your name, please?

A. Joe Smith.

Q. What is your occupation, Mr. Smith?

A. Life insurance salesman.

[fol. 99] Q. Where do you live?

A. 1217 Sayles Boulevard, Abilene.

Q. And how long have you lived in Abilene?

A. 32 years on June 15th.

Q. How long have you been engaged in the business of selling life insurance?

A. On January 15th it will be 27 years.

Q. During that time have you taken any special training in the field of life insurance, or in investment counseling?

A. Home office courses is all.

Q. I see. What is the designation of C. L. U.?

A. That is similar to four years of university, it takes four years to get it, which I do not have.

Q. Have you been active in the field of War Bonds and War Bond sales in this particular area?

A. Yes.

Q. And what has been your official capacity in that field?

A. At the present time I am District Chairman of District 16 of Sales U. S. Savings Bonds.

Q. And throughout the period of your years as a life insurance salesman, and in connection with your war bond work, have you become familiar with the field of investment counselor and with the field of investments, generally?

A. I would think so, yes.

Q. Now, Mr. Smith, in connection with your work as an investment counselor and in connection with that field are you able to ascertain a specific amount of money that if invested at the highest safe rate will bring a stipulated income until a person reaches a certain age?

A. Yes, before the early years, our company had a guaranteed rate of interest of three and a half per cent. At the present time we are all paying two and a half.

[fol. 100] Q. Do you have your tables with you, Mr. Smith?

A. I think so.

Q. Do you have your tables with you?

A. I think so, yes.

Q. Now, Mr. Smith, what amount of money if invested in cash would bring a return of three hundred dollars per month for a person age 29, until that person reached the age of 50.

A. Of 50.

Q. Yes, sir.

A. 21 years?

Q. Yes, sir.

A. On a three and a half per cent basis, is $53,507.33. $53,507.33.

On two and a half per cent guarantee, $57,690.00.

Q. Now, assuming the same person and the same income, to the age of 60?

A. I have it here for three and a half. I do not have two and a half. I can figure it if you will give me the time.

Q. Well, what would at three and a half per cent be?

A. $67,438.25.

Mr. Alvis: What age?

Mrs. Tarpley: 29 to 60.

By Mrs. Tarpley:

Q. Now, do you also have with you, Mr. Smith, mortality tables that would show the life expectancy of a person age 29 years?

A. Well, I can answer that. It is 36.3.

[fol. 101] Q. 36.3 for a person age 29 years, is that correct?

A. That is an average. You can figure getting four years under—unfortunately ladies live longer than men.

Q. So, it is your opinion, Mr. Smith, that the mortality experience has been that the life expectancy of a woman of 29 years would be even longer than the 36, rather than less than the 36, is that correct?

A. That 36.3 is the average, figuring annuities, it costs a woman more to buy annuities than it does a man.

Mrs. Tarpley: That is all. Pass the witness.

Cross-examination.

By Mr. Alvis:

Q. Just a minute. You are Joe Smith, aren't you?

A. That is right.

Q. And you are in the insurance business?

A. Life insurance.

Q. Joe, do you know anything about what a man's life work expectancy would be, say a person 29, life work expectancy?

A. Well——

Q. Do you know anything about that?

A. Well, I can give you personally on it, Judge——

Q. Well, you know a man's life work expectancy is considerably less than his life expectancy, don't you?

A. I don't know. In my case I have reached the retirement age myself, Judge.

Q. All right, now——

Mrs. Tarpley: Just a minute.

If the Court please, we insist he be permitted to answer the question. That is what he is trying to do.

[fol. 102] Mr. Alvis: I want him to answer the question.

Mrs. Tarpley: That is what he is trying to do. Counsel

interrupts him every time he tries to say something, and we ask the witness be permitted to answer the very question counsel asked him.

The Court: Ask him and then pause and let him answer.

By Mr. Alvis:

Q. I will ask you this question, Joe, isn't it a fact that a man's life work expectancy is considerably less than his life expectancy?

A. I would say yes.

Q. All right now, Joe, you also know that the life expectancy of a railroad employee is different from the life expectancy of the average person like is calculated there in your mortality table, you know that, don't you?

A. Will you repeat that, Judge?

Q. You do know that the life expectancy of a railroad employee is less than the life expectancy of the average person, as shown by your table, don't you?

A. No, I don't know that, Judge.

Q. You don't know that?

A. No.

Q. Now, Joe, you are talking here about how much money it would take to invest say at three or three and a half per cent to make three hundred dollars per month, an income from that, you testified about that, didn't you? Now, if a person invested that amount of money and got his three hundred dollars per month, if at the end of that he would still have his initial investment, wouldn't he?

[fol. 103] A. No, it runs out.

You give me sixty-seven thousand dollars, I agree to give you three hundred dollars a month for thirty-one years. At the end of thirty-one years it is gone.

Q. I thought you said that was by a reasonable investment?

A. No, if you gave me.

Q. I thought you said that amount of money if reasonably invested at three and a half per cent would yield three hundred dollars per month?

A. Pay for retirement income.

Q. That is what you said, wasn't it?

A. That is right.

Q. Now, Mr. Smith, let me ask you this:

Of course, you know that a regularly employed person, receiving wages, has to pay income tax, don't they?

A. That is right.

Q. And, of course, you know that in a lump sum settlement or anything like that that there is no income taxes deducted, don't you?

A. Repeat that, I didn't quite get you?

Q. You do know that in a lawsuit, a settlement of a claim on a cash basis and an award by a jury that the plaintiff does not have to pay any income tax on that, you know that, don't you?

A. I didn't know that; I have to pay income tax on everything I earn.

Q. In other words, you haven't sued anybody for anything then. You don't know anything about that then, do you?

Now, Joe, of course, you don't know Mrs. Thomson here, do you?

A. No, that is the first time I ever saw her.

Q. How is that?

A. The first time I ever saw her.

[fol. 104] Q. Now, a person that has suffered with a kidney trouble, abnormalities of the back, and things of that kind, you would not consider them a normal person, would you, so far as life expectancy is concerned, would you?

A. The only way insurance companies would—they just wouldn't take her for life insurance.

Q. That is, she just wouldn't be insurable?

Mr. Scarborough: Now, now——

A. Without a thorough examination.

By Mr. Alvis:

Q. All right, if that examination showed she had kidney trouble there with pus and blood in her urine you would not take her, would you?

A. Postpone her.

Q. You would postpone her?

A. The risk, maybe, would.

Q. How is that?

A. The risk maybe would postpone her.

Q. In other words, you would not issue a policy at that time?

A. No.

Q. Of course, you don't know anything about the life expectancy of a woman in the condition I have just described, do you?

A. No.

Mr. Alvis: That is all.

[fol. 105] Mrs. Tarpley: That is all.

Plaintiff rests, Your Honor.

(Colloquy between court and counsel.)

The Court: I hardly think we will start the defense this afternoon, so, ladies and gentlemen of the jury, don't make up your mind about the case until you have heard the entire case, and had the charge of the Court.

Mr. Alvis: Your Honor, we do have a motion that we have a small brief on that I would like to submit at your convenience.

The Court: You might be excused, and I will hear these lawyers on some matters. Be back at 9:30 in the morning.

(Jury retires from Courtroom.)

Mr. Look: Your Honor, I have prepared an informal memorandum of my authorities on that.

Mrs. Tarpley: Is it allowed for the enemy to have a copy, Jack?

Mr. Look: Yes, I am going to give you one right now.

Your Honor, this motion is predicated upon the lack of a showing of the proximate cause, as a matter of law. The case that we have found on this question are F. E. L. A. [fol. 106] cases and also cases of employers who fail to carry group, and practically the same law as F. E. L. A. applies there. In other words, the defense of contributory negligence and assumed risk, and so forth, are not applicable.

(At this time argument on motion was made.)

The Court: * * * So, in these cases of this type, why, a Judge does not get a heap of encouragement about taking

it away from the jury. I think we will let the case go to the jury.

Mr. Look: Of course, Your Honor, we will resubmit essentially the same motion at the conclusion.

The Court: You can urge your motion now and again at the conclusion of all of the testimony.

Mr. Look: Yes, I will. I felt seriously—usually, you make one as a matter of form, but we did feel very strongly about this one, that is why we took the trouble to make the——

The Court: All right, I will take the motion along, and if I get a chance I will study it further.

Mr. Look: I would like to leave the books with you if you wish.

The Court: If you follow me around you will find I do not have much chance to read a book.

[fol. 107] (Whereupon an adjournment was taken to 9:30 o'clock a.m. April 28, 1955, at which time the following proceedings were had:)

Morning Session April 28, 1955, 9:30 A.M.

The Court: You may proceed.

Mr. Look: Thank you, Your Honor.

Would You mark these two, please?

(The instruments above referred to were here marked Defendant's Exhibits Numbers 3 and 4, for identification.)

Mr. Look: Your Honor, we offer in evidence Defendant's Exhibit Number 3, which I have previously shown to plaintiff's counsel, record of the earnings of Mrs. Thomson from July, 1952 to the present.

Mrs. Tarpley: No objections, Your Honor.

(Defendant's Exhibit Number 3, is as follows:)

[fol. 108]

DEFENDANT'S EXHIBIT No. 3

Rubynelle S. Thomson SS–714–16–8932 Id. #21925

		Gross	RRAD	FIT	Hosp.	NRTS	PLI	Cr. Un.	Amount Due
July	1952	$256.17	$16.01	$51.24	$4.60	$36.00	$4.40	.....	$143.92
August	1952	249.24	15.58	49.84	4.60	.....	4.40	$25.00	149.82
September	1952	272.04	17.00	54.41	4.60	.....	4.40	25.00	166.63
October	1952	289.28	18.08	46.66	4.60	.....	4.40	12.50	203.04
November	1952	318.74	18.75	52.54	4.60	.....	4.40	.....	238.45
December	1952	28.98	1.81	.20	3.60	.....	4.40	.....	18.97
January	1953	72.04	4.50	8.81	3.85	.....	4.40	.....	50.48
March	1953	259.35	16.21	40.67	4.60	.....	4.40	.....	193.47
April	1953	312.24	18.75	51.25	4.60	.....	4.40	.....	233.24
May	1953	268.04	16.75	42.41	4.60	.....	4.40	.....	199.88
June	1953	304.25	18.75	49.65	4.60	.....	4.40	.....	226.85
July	1953	79.70	4.98	10.34	3.85	.....	....	.....	56.13
September	1953	117.06	7.32	17.81	4.10	.....	4.40	.....	87.83
December	1953	147.47	9.22	20.91	4.10	.....	4.40	.....	108.84
January	1954	66.28	4.14	6.89	3.85	.....	4.40	.....	47.00
February	1954	133.41	8.34	18.97	4.10	.....	4.40	.....	97.60
March	1954	291.49	18.22	42.39	4.60	.....	4.40	.....	221.88
April	1954	72.78	4.55	8.06	3.85	.....	4.40	.....	51.92
May	1954	307.18	18.75	45.21	4.60	.....	4.40	.....	234.22
June	1954	324.02	18.75	48.24	4.60	.....	6.70	15.00	230.73
July	1954	309.29	18.75	15.35	4.60	.....	6.70	.....	263.89
August	1954	324.02	18.75	38.16	4.60	.....	6.70	.....	255.81
September	1954	60.25	5.85	.....	3.85	.....	6.70	.....	43.85
October	1954	177.70	11.11	11.83	4.35	.....	6.70	.....	143.71

[fol. 109] Mr. Look: And Defendant's Exhibit Number 4, if it please the Court, a record of the days and places worked by Mrs. Thomson from December, 1952 to the present.

Mrs. Tarpley: No objection.

DEFENDANT'S EXHIBIT No. 4

Hours Worked by Rubynelle S. Thomson Social Security No. 714-16-8932, Id. No. 21925 December 3, 1952 through October 31, 1954.

Month	Date	Hours Worked	Position Number	Title	Location
Dec. 1952	3	8	W- 305	Operator	Monahans
Jan. 1953	4-8	Vacation	W- 305	Operator	Monahans
Feb. 1953	—	No earnings	Service not performed		
Mar. 1953	6	8	W-1211	Operator	Odessa
	7	8	W- 299	Operator	Odessa
	8	8	W- 299	Operator	Odessa
	9	8	W- 910	Operator	Odessa
	10	8	W- 910	Operator	Odessa
	12	8	W-1211	Operator	Odessa
	13	8	W-1211	Operator	Odessa
	14	8	W- 299	Operator	Odessa
	15	8	W- 299	Operator	Odessa
	16	8	W- 910	Operator	Odessa
	17	8	W- 910	Operator	Odessa
	19	8	W-1211	Operator	Odessa
	20	8	W-1211	Operator	Odessa
	21	8	W- 299	Operator	Odessa
	22	8	W- 299	Operator	Odessa
	23	8	W- 910	Operator	Odessa
	24	8	W- 910	Operator	Odessa
	31	8	W- 910	Operator	Odessa
[fol. 110]					
Apr. 1953	2	8	W-1211	Operator	Odessa
	3	8	W-1211	Operator	Odessa
	4	8	W- 299	Operator	Odessa
	5	8	W- 299	Operator	Odessa
	6	8	W- 910	Operator	Odessa
	7	8	W- 910	Operator	Odessa
	9	8	W-1211	Operator	Odessa
	10	8	W-1211	Operator	Odessa
	11	8	W- 299	Operator	Odessa
	12	8	W- 299	Operator	Odessa
	13	8	W- 910	Operator	Odessa
	14	8	W- 910	Operator	Odessa
	18	8	W- 299	Operator	Odessa
	19	8	W- 299	Operator	Odessa
	20	8	W- 910	Operator	Odessa
	21	8	W- 910	Operator	Odessa
	23	8	W-1211	Operator	Odessa
	25	8	W- 299	Operator	Odessa
	26	8	W- 299	Operator	Odessa
	27	8	W- 910	Operator	Odessa
	28	8	W- 910	Operator	Odessa

Month	Date	Hours Worked	Position Number	Title	Location
May 1953	5	8	W- 910	Operator	Odessa
	12	8	W- 910	Operator	Odessa
	14	8	W-1211	Operator	Odessa
	15	8	W-1211	Operator	Odessa
	16	8	W- 299	Operator	Odessa
	17	8	W- 299	Operator	Odessa
	18	8	W- 910	Operator	Odessa
	19	8	W- 910	Operator	Odessa
	21	8	W-1211	Operator	Odessa
	22	8	W-1211	Operator	Odessa
	23	8	W- 299	Operator	Odessa
	24	8	W- 299	Operator	Odessa
	25	8	W- 910	Operator	Odessa
[fol. 111]					
	26	8	W- 910	Operator	Odessa
	28	8	W-1211	Operator	Odessa
	29	8	W-1211	Operator	Odessa
	30	8	W- 299	Operator	Odessa
	31	8	W- 299	Operator	Odessa
June 1953	1	8	W- 910	Operator	Odessa
	2	8	W- 910	Operator	Odessa
	9	8	W- 910	Operator	Odessa
	11	8	W-1211	Operator	Odessa
	12	8	W-1211	Operator	Odessa
	13	8	W- 299	Operator	Odessa
	14	8	W- 299	Operator	Odessa
	15	8	W- 910	Operator	Odessa
	16	8	W- 910	Operator	Odessa
	18	8	W-1211	Operator	Odessa
	19	8	W-1211	Operator	Odessa
	20	8	W- 299	Operator	Odessa
	21	8	W- 299	Operator	Odessa
	22	8	W- 910	Operator	Odessa
	23	8	W- 910	Operator	Odessa
	25	8	W-1211	Operator	Odessa
	26	8	W-1211	Operator	Odessa
	27	8	W- 299	Operator	Odessa
	28	8	W- 299	Operator	Odessa
	29	8	W- 910	Operator	Odessa
	30	8	W- 910	Operator	Odessa
July 1953	2	8	W-1211	Operator	Odessa
	3	8	W-1211	Operator	Odessa
	4	8	W- 299	Operator	Odessa
	5	8	W- 299	Operator	Odessa
	7	8	W- 910	Operator	Odessa
Aug. 1953	—	—	No service performed		
Sept. 1953	2	8	W-1184	Operator	Midland
[fol. 112]					
	5	8	W-1184	Operator	Midland
	6	8	W- 257	Operator	Sweetwater
	9	8	W- 257	Operator	Sweetwater
	10	8	W- 257	Operator	Sweetwater
	11	8	W- 257	Operator	Sweetwater
	12	8	W- 257	Operator	Sweetwater
	13	8	W- 257	Operator	Sweetwater
Oct. 1953	—	—	No service performed		
Nov. 1953	—	—	No service performed		

Month	Date	Hours Worked	Position Number	Title	Location
Dec. 1953	15	8	W- 257	Operator	Sweetwater
	21	8	W- 243	Operator	Abilene
	22	8	W- 243	Operator	Abilene
	23	8	W- 243	Operator	Abilene
	26	8	W- 243	Operator	Abilene
	27	8	W- 243	Operator	Abilene
	28	8	W- 243	Operator	Abilene
	29	8	W- 243	Operator	Abilene
	30	8	W- 243	Operator	Abilene
	31	8	W- 244	Operator	Abilene
Jan. 1954	1	8	W- 244	Operator	Abilene
	2	8	W- 244	Operator	Abilene
	3	8	W- 244	Operator	Abilene
	6	8	W- 244	Operator	Abilene
Feb. 1954	15	8	W- 326	Agent-Opr.	Kent
	16	8	W- 326	Agent-Opr.	Kent
	17	8	W- 326	Agent-Opr.	Kent
	18	8	W- 326	Agent-Opr.	Kent
	19	8	W- 326	Agent-Opr.	Kent
	23	8	W- 326	Agent-Opr.	Kent
	24	8	W- 326	Agent-Opr.	Kent
	25	8	W- 326	Agent-Opr.	Kent
	26	8	W- 326	Agent-Opr.	Kent
Mar. 1954	2	8	W- 890	Operator	Santo
[fol. 113]					
	4	8	W-1092	Operator	Santo
	5	8	W-1092	Operator	Santo
	7	8	W-1210	Operator	Colorado City
	10	8	W-1210	Operator	Colorado City
	11	8	W-1210	Operator	Colorado City
	12	8	W-1210	Operator	Colorado City
	13	8	W-1210	Operator	Colorado City
	14	8	W-1210	Operator	Colorado City
	17	8	W-1210	Operator	Colorado City
	18	8	W-1210	Operator	Colorado City
	19	8	W-1210	Operator	Colorado City
	20	8	W-1210	Operator	Colorado City
	21	8	W-1210	Operator	Colorado City
	24	8	W-1210	Operator	Colorado City
	25	8	W-1210	Operator	Colorado City
	26	8	W-1210	Operator	Colorado City
	27	8	W-1210	Operator	Colorado City
	28	8	W-1210	Operator	Colorado City
	31	8	W-1210	Operator	Colorado City
Apr. 1954	1	8	W-1210	Operator	Colorado City
	2	8	W-1210	Operator	Colorado City
	3	8	W-1210	Operator	Colorado City
	4	8	W-1210	Operator	Colorado City
	10	8	W-1092	Operator	Santo
May 1954	1	8	W-1211	Operator	Odessa
	2	8	W-1211	Operator	Odessa
	3	8	W-1211	Operator	Odessa
	4	8	W-1211	Operator	Odessa
	5	8	W-1211	Operator	Odessa
	8	8	W-1211	Operator	Odessa
	9	8	W-1211	Operator	Odessa
	10	8	W-1211	Operator	Odessa
	11	8	W-1211	Operator	Odessa
	12	8	W-1211	Operator	Odessa

[fol. 114]

Month	Date	Hours Worked	Position Number	Title	Location
	15	8	W- 889	Agt-Opr.	Santo
	16	8	W- 889	Agt-Opr.	Santo
	17	8	W- 890	Operator	Santo
	18	8	W- 890	Operator	Santo
	22	8	W- 889	Agt-Opr.	Santo
	23	8	W- 889	Agt-Opr.	Santo
	24	8	W- 251	Agt-Opr.	Trent
	25	8	W- 251	Agt-Opr.	Trent
	26	8	W- 251	Agt-Opr.	Trent
	27	8	W- 251	Agt-Opr.	Trent
	28	8	W- 251	Agt-Opr.	Trent
June 1954	1	8	W- 251	Agt-Opr.	Trent
	2	8	W- 251	Agt-Opr.	Trent
	3	8	W- 251	Agt-Opr.	Trent
	4	8	W- 251	Agt-Opr.	Trent
	7	8	W- 251	Agt-Opr.	Trent
	8	8	W- 251	Agt-Opr.	Trent
	9	8	W- 251	Agt-Opr.	Trent
	10	8	W- 251	Agt-Opr.	Trent
	11	8	W- 251	Agt-Opr.	Trent
	14	8	W- 251	Agt-Opr.	Trent
	15	8	W- 251	Agt-Opr.	Trent
	16	8	W- 251	Agt-Opr.	Trent
	17	8	W- 251	Agt-Opr.	Trent
	18	8	W- 251	Agt-Opr.	Trent
	21	8	W- 251	Agt-Opr.	Trent
	22	8	W- 251	Agt-Opr.	Trent
	23	8	W- 251	Agt-Opr.	Trent
	24	8	W- 251	Agt-Opr.	Trent
	25	8	W- 251	Agt-Opr.	Trent
	28	8	W- 251	Agt-Opr.	Trent
	29	8	W- 251	Agt-Opr.	Trent
	30	8	W- 251	Agt-Opr.	Trent
July 1954	1	8	W- 251	Agt-Opr.	Trent

[fol. 115]

	2	8	W- 251	Agt-Opr.	Trent
	6	8	W- 251	Agt-Opr.	Trent
	7	8	W- 251	Agt-Opr.	Trent
	8	8	W- 251	Agt-Opr.	Trent
	9	8	W- 251	Agt-Opr.	Trent
	12	8	W- 251	Agt-Opr.	Trent
	13	8	W- 251	Agt-Opr.	Trent
	14	8	W- 251	Agt-Opr.	Trent
	15	8	W- 251	Agt-Opr.	Trent
	16	8	W- 251	Agt-Opr.	Trent
	19	8	W- 251	Agt-Opr.	Trent
	20	8	W- 251	Agt-Opr.	Trent
	21	8	W- 251	Agt-Opr.	Trent
	22	8	W- 251	Agt-Opr.	Trent
	23	8	W- 251	Agt-Opr.	Trent
	26	8	W- 251	Agt-Opr.	Trent
	27	8	W- 251	Agt-Opr.	Trent
	28	8	W- 251	Agt-Opr.	Trent
	29	8	W- 251	Agt-Opr.	Trent
	30	8	W- 251	Agt-Opr.	Trent
Aug. 1954	2	8	W- 251	Agt-Opr.	Trent
	3	8	W- 251	Agt-Opr.	Trent
	4	8	W- 251	Agt-Opr.	Trent

Month	Date	Hours Worked	Position Number	Title	Location
	5	8	W- 251	Agt-Opr.	Trent
	6	8	W- 251	Agt-Opr.	Trent
	9	8	W- 251	Agt-Opr.	Trent
	10	8	W- 251	Agt-Opr.	Trent
	11	8	W- 251	Agt-Opr.	Trent
	12	8	W- 251	Agt-Opr.	Trent
	13	8	W- 251	Agt-Opr.	Trent
	16	8	W- 251	Agt-Opr.	Trent
	17	8	W- 251	Agt-Opr.	Trent
	18	8	W- 251	Agt-Opr.	Trent
[fol. 116]					
	19	8	W- 251	Agt-Opr.	Trent
	20	8	W- 251	Agt-Opr.	Trent
	23	8	W- 251	Agt-Opr.	Trent
	24	8	W- 251	Agt-Opr.	Trent
	25	8	W- 251	Agt-Opr.	Trent
	26	8	W- 251	Agt-Opr.	Trent
	27	8	W- 251	Agt-Opr.	Trent
	30	8	W- 251	Agt-Opr.	Trent
	31	8	W- 251	Agt-Opr.	Trent
Sept. 1954	1	8	W- 251	Agt-Opr.	Trent
	2	8	W- 251	Agt-Opr.	Trent
	3	8	W- 251	Agt-Opr.	Trent
	22	8	W- 246	Agt-Opr.	Merkel
Oct. 1954	4	8	W- 266	Agt-Opr.	Loraine
	5	8	W- 266	Agt-Opr.	Loraine
	6	8	W- 266	Agt-Opr.	Loraine
	7	8	W- 266	Agt-Opr.	Loraine
	8	8	W- 266	Agt-Opr.	Loraine
	11	8	W- 266	Agt-Opr.	Loraine
	12	8	W- 266	Agt-Opr.	Loraine
	13	8	W- 266	Agt-Opr.	Loraine
	14	8	W- 266	Agt-Opr.	Loraine
	15	8	W- 266	Agt-Opr.	Loraine

Mr. Look:

Please call Mr. Higginbotham.

[fol. 117] T. R. Higginbotham, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. State your name, please.
A. T. R. Higginbotham?
Q. Where do you live, Mr. Higginbotham?
A. Monahans.
Q. By whom are you employed?

A. Texas & Pacific Railway Company.

Q. In what capacity?

A. Agent-yard master.

Q. How long have you been employed by the Texas & Pacific Railway Company?

A. February 11, 1928.

Q. And as agent at Monahans, how long have you been there?

A. October 1, 1951.

Q. Have you been there continuously since that date?

A. Yes, sir.

Q. As agent what are your duties, briefly, Mr. Higginbotham?

A. General supervision of the office personnel and the train crews for Texas & New Mexico Railroad Company.

Q. Are you what would be called boss of the Monahans operations?

A. Yes, sir.

Q. Now, Mr. Higginbotham, do you know Mrs. Thomson?

A. Yes, sir.

Q. Was she employed at Monahans by the Texas & Pacific Railway Company at any time you were there?

[fol. 118] A. Yes, sir.

Q. And in what capacity?

A. As telegraph operator-ticket seller.

Q. And as such what were her duties?

A. Her duties were copying train orders and messages pertaining to the movement of trains, and selling tickets, and clerical work, as making freight abstracts, ticket report, that is, the daily report on tickets sold, and then assisted in working passenger trains that might be on her shift.

Q. Will you state whether or not these are the normal duties of an operator at Monahans, Texas?

A. Yes, sir.

Q. Are they the normal duties of the operators up and down the railroad?

A. Yes, sir.

Q. Now, you stated that her duty was to assist with the mail and baggage. Were other folks assigned to that duty or not?

A. Yes, sir.

Q. Who?

A. One, namely, Jose Vasquez.

Q. And what passenger trains were due to arrive or depart during Mrs. Thomson's shift?

A. Train Number Two.

Q. And about what time of the morning would it get into Monahans?

A. The time shown on the time table, to leave at 7:20.

Q. And what did the duties of handling mail and baggage consist of, Mr. Higginbotham?

A. Well, we had a very small amount of mail that goes on train Two, which normally goes in the RPO car, that is the Railway Postal Car, and then there is some mail that comes out of the baggage car which is in the same car as the RPO, it is a combination car, so to speak.

[fol. 119] Q. Now, in regard to the handling of mail would you please tell this Court the operations that were involved, in so far as your station was concerned, and Number Two train?

A. Well, this mail is assembled in the baggage room, or at the north door of the baggage room by trucks that haul it down from points in New Mexico, north out of Mon-hans, named Lovington, Hobbs, Eunice, Jal, Kermit and Wink. This is assembled by warehouse laborers and put on two baggage trucks for movement on Train Two and Train Seven and——

Q. When is Train Seven due in, sir?

A. I don't recall the time now. That train, I believe at that time was about 9:00 o'clock, or——

Q. Was it after Mrs. Thomson's shift?

A. Oh, yes, sir.

Q. All right, in regard to Train Two, please, sir?

A. The baggage—the trucks were pulled through the baggage room, for both trains, and parked in front, or on the south side of the depot, which is between the depot and the main track where Train Two will arrive.

Q. Now, in regard to the operator, what duties did she have when delivering, or she have when handling mail?

A. Well, it would be to come out and assist this Vasquez in putting on and putting off the mail on Train Two, if

she wasn't tied up with a train order or a ticket at the last minute.

Q. Who is Vasquez?

A. Well, he is a warehouse laborer.

Q. By whom is he employed?

A. Texas & Pacific Railway Company.

Q. Is he under your control and supervision as such?

A. Yes, sir.

Q. And was on December 3, 1952?

A. Yes, sir.

[fol. 120] Q. Now then, did Mrs. Thomson ever complain to you that the work of handling the mail was too difficult for her?

A. No, sir.

Q. And did you instruct her as the agent to handle the mail?

A. Yes, sir, assist in handling the mail.

Q. Assist in handling it.

Now, on the morning of December 3, 1952, do you recall that morning at all in any particular?

A. No, sir.

Q. Was there anything at all unusual about that day, so far as you know?

A. No, sir.

Q. Were you the immediate superior of Mrs. Thomson at that time?

A. Yes, sir.

Q. Did she, on December 3rd, or any time in 1952, complain to you about injuring her back at any time?

A. No, sir.

Q. When is the first you knew, as her superior, of any claimed injury to her back while working?

A. I never knew of it while she was working.

Q. When did you first discover then she was claiming such?

A. Well, it is since this suit has been brought to light that I heard that she had injured her back.

Mr. Look: Please mark this as D-5.

(The instrument above referred to was here marked Defendant's Exhibit Number 5, for identification.)

[fol. 121] By Mr. Look:

Q. Mr. Higginbotham, I hand you what has been marked Defendant's Exhibit Number 5 and ask you if you recognize that?

A. Yes, sir.

Q. What is it, sir?

A. It is a picture of the Monahans station and platform in front.

Q. Is that picture a fair representation of the conditions as they existed on or about December 3, 1952?

A. Yes, sir.

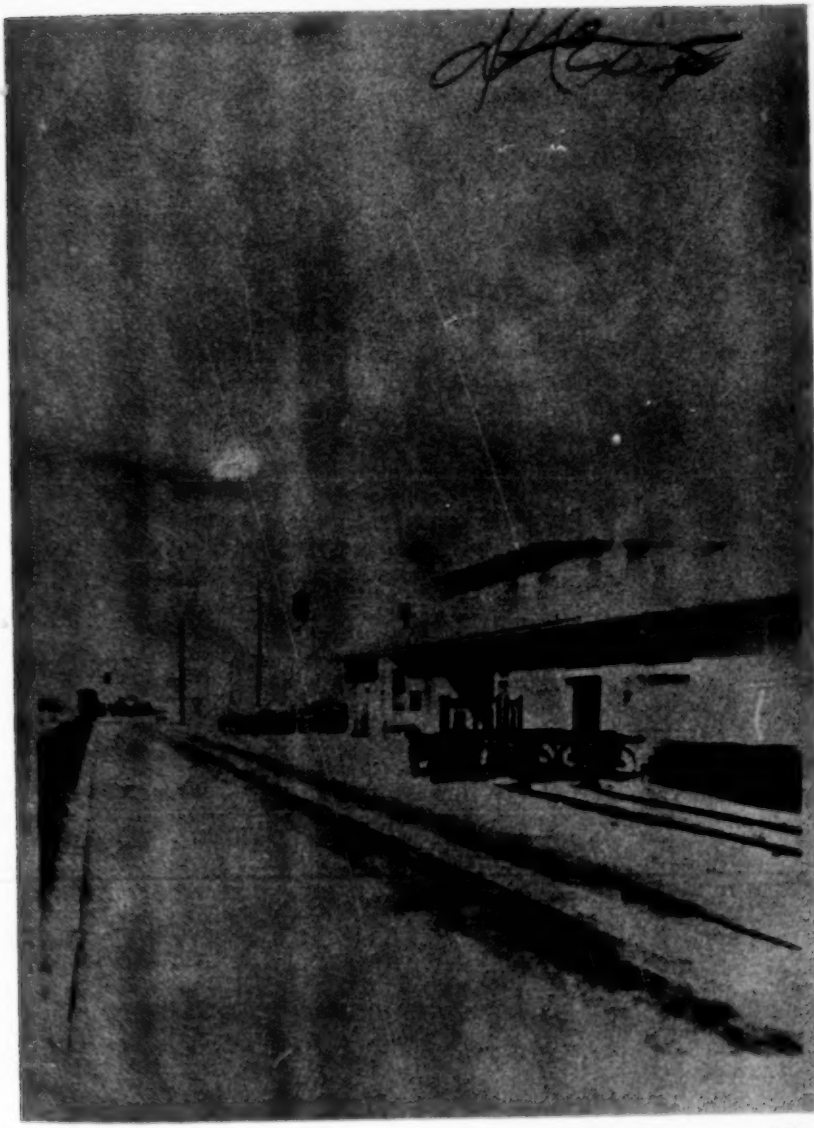
Mr. Look: We offer in evidence Defendant's Exhibit Number 5, Your Honor.

Mrs. Tarpley: No objection.

(Defendant's Exhibit Number 5 is as follows:)

(Here follows 1 Photolithograph, side folio 122)

Defendant's Exhibit No. 5 92A



[fol. 123] By Mr. Look:

Q. Before I hand this to the jury would you please show me, show the jury, hold it over this way, if you can, where the baggage room is that you are talking about?

A. Here is the open door.

Q. And is that the south door?

A. That is the south door.

Q. And the tracks then run east and west?

A. That is right.

Q. Now then, this area out in front, between the tracks that we see here and the station house, is that dirt, or what type of—is there any type of covering on it?

A. That is a hard surface, gravelly—not gravelly, but asphalt topping.

Q. And was that that way on December 3, 1952?

A. Yes, sir.

Q. Could I see Defendant's Number 1, please?

Now, I hand you Defendant's Exhibit Number 1 and ask you to look at that and tell me what it is, if you can?

A. That is what we call a baggage truck.

The Court: Counsel, I believe you call this Number 1?

Mr. Look: Yes, sir.

The Court: Have you designated the other one?

Mr. Look: Yes, sir, I have. Defendant's Exhibit Number 5, Your Honor, the other one.

[fol. 124] The Court: All right, go ahead.

By Mr. Look:

Q. Is this the sort of baggage truck you had in December, in December, 1953, specifically December 3rd?

Mr. Alvis: December, 1952.

A. 1952.

By Mr .Look:

Q. '52, I am sorry.

A. Yes, sir.

Q. How many of those trucks, as you call them, did you have there at Monahans at that time, sir?

A. I believe we had eight.

Q. And were the personnel free to use any or all of them?

A. Yes, sir.

Q. And what type of wheels, tires, did they have on them?

A. They had rubber tires.

Q. Now then, of course, at Christmas time the mail picks up, does it not, sir?

A. Yes, sir.

Q. When did the mail rush start?

A. Between the 10th and 12th of December.

Q. Until that time was there any appreciable increase or not in the amount of mail handled at the station at Monahans, Texas?

A. I would say it was normal.

[fol. 125] Mr. Look: That is all.

Cross-examination.

By Mr. Tarpley:

Q. Mr. Higginbotham, where do you live in Monahans?

A. I live over the depot.

Q. Over the depot?

A. Yes.

Q. And as such it is possible for you to watch the station a good deal more than if you lived away from there, isn't that correct?

A. That is correct.

Q. What are your normal assigned working hours?

A. The job is 5:00—8:00 till 5:00, but I am on, subject to call at all hours.

Q. I see. Now then, on the morning of December 3rd at about 7:30 you were not officially on duty, is that correct?

A. I would say I was.

Q. Were you working on that morning?

A. Yes, ma'am.

Q. Were you downstairs in the station?

A. Yes, ma'am.

Q. I see. Did you observe Mrs. Thomson working the mail on the Number Two that morning?

A. This racket back here, I didn't hear it?

Q. I said, did you observe Mrs. Thomson working the mail on Number Two that morning?

A. I don't remember December 3rd.

Q. I see. You have no recollection about it one way or the other?

A. No, ma'am.

[fol. 126] Q. Now, you have said that it was the telegraph operator's duty to assist in working the mail. Specifically, what do you mean by "assist", Mr. Higginbotham?

A. Well I mean that if there were two assisting in getting working the mail, the train would be expedited in getting out that is what I mean.

Q. You mean actually helping in the loading and unloading of the mail, is that correct?

A. That is right.

Q. All right. How long had Mrs. Thomson been at the Monahans station before December 3, 1952?

A. She was assigned that job on October 16th, and I have my payroll for that month but I don't recall the date.

Q. Some time in October that she came to work there, is that correct?

A. Yes, ma'am.

Q. All right. Now, for the period of October and November, in that period of October when she was working who loaded and unloaded the mail during that time?

A. Well, Vasquez was the warehouse laborer that was assigned in helping to do that job, and then, of course, the operator was supposed to assist in doing it, help.

Q. Was the handling of the mail a duty of Vasquez, or was it a duty of the operator?

A. Of both.

Q. Of both. Now, let's see? Excuse me, go ahead and finish it.

Now, you have identified a baggage cart which was used in loading and unloading the mail, have you not?

A. That is right.

Q. That is this type of baggage cart. And you have identified a picture of the station there at Monahans?

A. Yes, ma'am.

[fol. 127] Q. Hold it this way, if you will, and show to

the jury which track Number Two came in on there at the Monahans station?

A. On this track here.

Q. That is the track that has the freight cars shown on it?

A. That is the main track, yes, ma'am.

Q. In order to get the baggage cart from the door of the baggage room to its position to load it on the train it was necessary to pull over these tracks, was it not?

A. Not this one, but this one. This track stops.

Q. This track shown in the center of the picture, is that right?

A. Yes, ma'am.

Q. I believe you said a moment ago that you had a conversation with Mrs. Thomson a few days before this happened and instructed her to handle the mail, is that correct?

A. I told her that she—that it was her duty to assist in handling mail, and she had not done it, she had not been doing so.

Q. About how long before December 3, 1952 was it you had this conversation?

A. I don't know.

Q. Do you have any idea?

A. No, ma'am.

Q. She had been in the station for some time, however, had she not?

A. Well, not too long, because she had only been there since some time the latter part of October.

Q. All right now, was it a policy at that time, Mr. Higginbotham, of the T&P to encourage its women employees to wear skirts and hose rather than slacks?

A. I don't know.

Q. To work?

[fol. 128] A. I had no instructions to that effect.

Q. You had no instructions about that.

Then, a few days before this accident you had instructed Mrs. Thomson that it was her duty to assist in handling this mail?

A. Sure.

Q. And by assisting you meant climbing up on the

baggage carts and actually picking up the mail and loading and unloading it, is that correct?

A. That is what all the operators are supposed to do.

Q. And you instructed her it was her duty?

A. Certainly.

Q. Isn't it a fact that you also instructed her it was her sole duty and that no one else was to touch the mail besides her?

A. No.

Q. You deny that. I believe that is all. Pass the witness.

Redirect examination.

By Mr. Look:

Q. Where is the other? Defendant's Exhibit 5?

Now then, sir, I hand you Defendant's Exhibit Number 5 and ask you where—if the RPO and baggage car was ordinarily loaded when the train stopped about the same place or not?

A. About the same position on the platform every day, and I would say about the point of this switch here which leads into the east pass, right in that vicinity.

Mr. Look: Thank you, that is all.

Mrs. Tarpley: That is all.

[fol. 129] A. P. Sligh, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. Please state your name, sir?

A. A. P. Sligh.

Q. And where do you live, Mr. Sligh?

A. Monahans, Texas.

Q. What is your occupation?

A. I work for the T&P Railroad as cashier, accountant and rate clerk.

Q. And as such, of what do your duties comprise?

A. As the cashier I handle the cash; and as the accountant I do the station accounting and handle the freight rates.

Q. And do you have any other duties that you perform at that station?

A. Well, yes, I work the mail from one westbound train.

Q. Now then, at December, 1952 what were your normal working hours?

A. From 7:00 a. m. until 4:00 p. m.

Q. And now then, you said you worked on train. What train would that be?

A. That is our westbound train Number Seven.

Q. Now, was anybody else working that train along with you?

A. Yes, there would be, oh, several more assisting.

Q. Now then, how long have you been employed there in Monahans by the T&P?

A. Oh, with the exception of nine months I have been there since April, 1942.

Q. How long have you been working for that railroad?

[fol. 130] A. Approximately eighteen years.

Q. And were you Mrs. Thomson's superior?

A. No, sir.

Q. Was she your superior?

A. No, sir.

Q. Now, was your desk or office in the same room as Mrs. Thomson's?

A. Yes, yes, it is in the same room.

Q. And did she ever complain to you——

A. No.

Q. —about the heaviness of any mail handling?

A. No, sir.

Q. Did she complain to you on the morning of December 3, 1952 that she had hurt herself?

A. No, sir.

Mr. Look: That is all.

Cross-examination.

By Mrs. Tarpley:

Q. Do you specifically remember the morning of December 3, 1952?

A. No, I don't recall the exact time.

Q. Do you remember Mrs. Thomson saying anything to you that morning?

A. No, I do not.

Q. As a matter of fact, you just don't remember anything at all about any conversation that morning with Mrs. Thomson, do you?

A. No.

Q. You are not in a position now to say whether or not she complained to you about hurting her back on that morning or not?

[fol. 131] A. If she had complained, something of that nature, I am sure I would recall.

Q. You think you would remember?

A. Yes.

Q. However, you don't remember anything else about that morning?

A. No.

Q. All right, I believe you said it was your duty to work the mail on Number Seven, is that correct?

A. Yes.

Q. What time did Number Seven arrive?

A. At that time I believe it was 8:00 a.m., or approximately 8:00 a. m. Now, it may vary a few minutes.

Q. Now, was some of the mail that was taken out of Monahans on the Number Seven and the Number Two brought in from other points?

A. Yes, it congregates from trucks on our T&NM points.

Q. It is not just the mail that has been mailed in Monahans?

A. No.

Q. That goes out on that train?

A. No, ma'am.

Q. It goes out from several points over in New Mexico, is that correct?

A. Yes, ma'am.

Q. And there are only two trains a day on which that mail leaves?

A. Well, yes, yes, uh-huh.

Q. The Number Seven and Number Two?

A. Except now, the first class pouches, there are first class pouches on all trains.

Q. I believe you said a moment ago that there would be others assisting you in handling the mail on Number Seven, is that correct?

A. Yes.

[fol. 132] Q. Who would be your assistants, or who would be helping you with it?

A. Well, our agent, and the dock hands, or our dock laborers; also the yard clerk, Mr. Kittrell.

Q. Approximately how many people, normally, assisted in loading the mail on Number Seven?

A. Approximately seven.

Q. Approximately seven people?

A. Yes.

Mrs. Tarpley: That is all.

Redirect examination.

By Mr. Look:

Q. Mr. Sligh, how many baggage and/or RPO cars did Number Two carry?

A. Number Two?

Q. Number Two.

A. He has one RPO car and usually two baggage cars.

Q. And how about Number Seven?

A. Number Seven, he will have one RPO car and approximately three to four baggage cars.

Q. Now, in regard to the amount of mail and baggage that is taken on and off of Number Seven and Number Two, which is the greater?

A. Number Seven.

Q. Now, how many truckloads would normally come off of Number Two?

A. Oh, one-half, I would say.

Q. How about Number Seven?

A. Eight to ten.

Q. And by "trucks" we mean these four wheel carts?
[fol. 133] A. That is true.
Q. That is what I am talking about.
A. Yes.
Q. Now, when is the first you heard of Mrs. Thomson claiming any injury on the job in 1953?

Mrs. Tarpley: If the Court please.
Mr. Look: 1952.
Mrs. Tarpley: We will object to that as being irrelevant and immaterial as to when this witness first heard of her being injured; it has no relevancy to this lawsuit.
Mr. Look: It is offered for the purpose, Your Honor, for showing that someone that is apparently in pain will make a statement about it, and under the circumstances——
The Court: We will admit it as a circumstance, not conclusive of any matter, but a circumstance that may be considered.
Mrs. Tarpley: Note our exception.

By Mr. Look:

Q. Would you answer?
A. Will you state the question again?
Q. When was the first you knew of Mrs. Thomson claiming to have suffered any type of injury on the job on December 3, 1952?
A. Within the past six weeks to two months.
[fol. 134] Mr. Look: That is all.

Mrs. Tarpley: No further questions.

Jack Kittrell, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. Would you state your name, please?
A. Jack Kittrell.
Q. Where do you live, Mr. Kittrell?
A. Monahans, Texas.

Q. What is your occupation?

A. General clerk for the railroad company.

Q. Is that the Texas & Pacific Railway Company?

A. Yes, sir.

Q. How long have you been employed by the Texas & Pacific Railway Company?

A. Thirty years and about two months, close.

Q. How——

A. Two months the 10th of next month.

Q. How long have you been general clerk at Monahans for the Texas & Pacific Railway Company?

A. Since September 1, 1935.

Q. And as such general clerk what are your duties?

A. Well, the handling the yard and the making the list for the trains, the locations and the switching of the cars for the destination where they go, and consignee and so forth, for the Texas & New Mexico Railroad and also the east and west locations also on the main line.

[fol. 135] Q. Do you perform any other duties about your job?

A. Yes, I help unload the mail on Train Number Seven.

Q. And at December 3, 1952 what were your normal working hours?

A. 4:00 a. m. until 12:00 Noon.

Q. And where was your desk located? Was it in the same office as Mrs. Thomson's?

A. Yes, sir.

Q. Were you Mrs. Thomson's superior?

A. No.

Q. Was she your superior?

A. No.

Q. And on December 3, 1952 were you on duty?

A. Yes, sir.

Q. And do you recall whether or not Mrs. Thomson made any complaint to you, or in your presence, about having been injured while on the job?

A. No, I did not—I don't remember anything like that.

Q. Now, you state you have been in Monahans since 1935, I believe?

A. Yes, sir.

Q. And have been continuously there?

A. Yes, sir.

Q. And are you generally acquainted with the duties of the other personnel in that station?

A. Well, yes.

Q. Particularly in so far as working trains are concerned?

A. Yes, sir.

Q. And has it or has it not been the normal practice at Monahans for operators to work certain trains?

A. Yes, sir.

Q. And how long has that been true?

A. Since I have been there.

[fol. 136] Q. Now then, when is the first you heard of Mrs. Thomson claiming to have received any injury while working?

A. Well, I don't know exactly how long, but it was this——

Mrs. Tarpley: If the Court please, may our previous objection go to this question as addressed to this witness?

The Court: Yes, and it will run to any other question of the same tenor.

Mrs. Tarpley: Thank you.

The Court: I give you the same ruling.

A. I don't recall the date but it was when Mr. Reynolds came up there about—some time ago, and asked about it, and was talking about it.

By Mr. Look:

Q. By "some time ago" what do you mean? Two or three years?

A. No, I would say a month or so ago, something like that; I don't know exactly.

Mr. Look: That is all.

[fol. 137] Cross-examination.

By Mrs. Tarpley:

Q. Do you recall anything at all about the morning of December 3, 1952?

A. Nothing unusual.

Q. The morning does not stand out in your mind as to anything, particularly?

A. No.

Q. Now, on the Number Two train, who had been working the mail on that Number Two prior to December 3rd?

A. The operators usually—always worked Number Two.

Q. I see. The operators worked the mail?

A. Yes, ma'am.

Q. Did they have any assistance in working that mail?

A. I don't think so, unless they had—I never go out there to see if they have anybody—asked somebody to help them, or not.

Q. So far as you know, however, the operators——

A. The operators, that is their duty.

Q. —work the mail by themselves?

A. Uh-huh.

Q. Now, prior to December 3, 1952 had you ever seen Jose Vasquez working the mail on Number Two?

A. I never paid any attention to it, whether he did or not.

Q. Never paid any attention to it?

A. Nuh-uh.

Mrs. Tarpley: All right, that is all.

[fol. 138] Redirect examination.

By Mr. Look:

Q. Did Mrs. Thomson ever at any time complain to you that the work was physically too difficult for her?

A. I don't recall anything like that.

Mr. Look: That is all.

Mrs. Tarpley: Stand down.

JOSE VASQUEZ, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. This witness has been sworn.
What is your name?
A. Jose Vasquez.
Q. And where do you live, Jose?
A. Monahans, Texas.
Q. And who do you work for?
A. T&P Company.
Q. And how long have you worked for them?
A. A little over ten years.
Q. And what job do you have with them?
A. Handling freight and working mail and baggage.
Q. Now, back in December, 1952 what were your normal working hours? When would you go to work in the morning?
A. 6:00 o'clock.
[fol. 139] Q. And in regard to handling mail what were your duties?
A. Work train Number Two and work mail, put some mail on, get some mail off, and baggage, if there is any.
Q. Now, how long had you been holding down that particular job before 1952? When did you first start in that job?
A. Well, I don't exactly remember, but it was quite a while before 1952 I already had that.
Q. Had it been several years?
A. Several years.
Q. And how old are you, Jose?
A. 26.
Q. And just exactly what would you do to get ready for train Number Two?
A. Pull the buggy with the mail on and get another buggy empty ready for some mail having to come off of Number Two: I worked, the mail is supposed to go on, I put it on the RPO car and then got the other mail unloaded off of the baggage car.

Q. And then what would you do after you had loaded and then unloaded? Would you do anything with the carts, the trucks?

A. Pull the trucks to the baggage room.

Q. And was that work on train Number Two your daily, regular job, every day or just occasionally?

A. Every day.

Q. And were you working on December 3, 1952?

A. Yes, sir.

Q. And did you have anybody else that was also working the train, normally?

A. Besides the operators, no.

Q. But, the operators did help?

A. Uh-huh.

Q. And how long had that been the situation?

[fol. 140] A. About, oh, I would say about four or five weeks they started helping me, before that time.

Q. And before that had you ever had any help with it?

A. No, I worked it by myself.

Q. And did that morning now—as I understand it, you put the mail on at one end and take it off at the other end, is that right?

A. Yes, sir.

Q. And did Mrs. Thomson complain to you at all about being hurt while out there that morning?

A. No, sir, not that I remember.

Q. And about how far were you from her when you were loading and unloading mail?

A. I would say about fifty feet, or forty feet; fifty feet would be just about right.

Q. Was there anything unusual at all about that morning that sticks in your mind?

A. No, sir.

Mr. Look: Pass the witness.

Cross-examination.

By Mrs. Tarpley:

Q. Now, Jose, you said you had been with the T&P for about ten years, is that right?

A. Yes, ma'am.

Q. And how much of that time have you been at Monahans?

A. All the time.

Q. All the time?

A. All the ten years.

[fol. 141] Q. All right, how long had you been working the mail on Number Two before December of '52?

A. Well, most of—for several years. I don't exactly remember how many years, but——

Q. But, it had been for some little time, though, is that right?

A. Yes, ma'am.

Q. And during most of that time you worked the mail by yourself, is that correct?

A. Uh-huh.

Q. And you had no assistance from the operator or from anyone else, is that right?

A. That is right.

Q. You worked the mail all alone. When did you start getting some assistance, or when did the operators start helping you with the mail?

A. Well, I don't exactly remember, but it was about a month, or maybe a little more before the 3rd of December, 1952.

Q. Could it have been less than a month?

A. Well, I would say about a month or five weeks, something like that.

Q. Who was the operator at the time the agent started helping you with the mail?

A. Who was the operator?

Q. Yes, uh-huh, the telegraph operator.

A. Mrs. Thomson, I think.

Q. Mrs. Thomson was there, and so it was after Mrs. Thomson came to work at Monahans there that you started getting help on the mail, is that correct?

A. That is right.

Q. Now, I believe you have said that you helped to load and unload the mail on the morning of December 3rd of 1952, is that correct?

A. Yes, ma'am.

[fol. 142] Q. How do you happen to remember that particular morning?

A. Well, because I checked the payroll records and it shows on the payroll records that I was on duty that day.

Q. I see. That is the only recollection you have of that particular morning?

A. Yes, ma'am.

Q. You don't remember the morning of your own knowledge?

A. No, ma'am.

Q. You don't remember what you did on that morning, do you?

A. No, ma'am.

Q. You don't have any way of telling whether you actually loaded or unloaded the mail, or even touched the mail that morning?

A. No, ma'am I don't even remember all that.

Q. So, what you are testifying here about, a minute ago, was what you normally did, rather than what you actually did on the morning of December 3rd, isn't that right? Isn't that the—you had been instructed not to assist at all in the operation of the mail and in working on the mail?

A. Any what instructed?

Q. Isn't is a fact that in December, 1952 you were instructed by your superior not to work the mail at all on Number Two?

A. I don-t remember.

Q. You don't remember?

A. No, ma'am.

Mrs. Tarpley: About that?

I believe that is all.

[fol. 143] Mr. Look: That is all.

R. J. Thomson, Jr., a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. State your name, please?

A. R. J. Thomson, Jr.

Q. Are you the ex-husband of Mrs. Thomson here?

A. Yes, sir.

Q. Now, when were you married to Mrs. Thomson?

A. In 1943.

Q. And how long were you married to her?

A. Approximately nine years.

Q. And in regard to Mrs. Thomson's health, in 1943, when you knew her, did you notice anything unusual about her health?

A. Yes, sir, she complained quite a bit about her back troubles.

Q. And was that before or after you were married?

A. Well, the first notice that I had of it was prior to the time we married, while we were courting.

Q. Did you have any conversation with her at all about her back trouble?

A. Yes, sir, we dis-ussed the fact she could not relax, to rest or anything like that, she had to sit very straight up in chairs, and things such as that.

Q. Did she attribute that trouble to anything at that time?

A. Yes, sir, she did.

Q. To what?

[fol. 144] A. She had received two injuries in her earlier life.

Q. And what were they?

A. One of them was falling astraddle a fence, around a fenced yard, that was the earliest one, the first one, injuring her lower part of her spinal column, she said.

And the second one was during her school days one of her girl friends pulled a chair out from under her and injured her back.

Q. Now, after you were married, did Mrs. Thomson continue, or not, to have back trouble?

A. Yes, sir.

Q. And would she complain of it to you?

A. Yes, sir.

Q. And what were the nature of the complaints, what would the nature of the complaint be?

A. Well, that more or less she could not do her housework on account of this hurting in her back; she was a good housekeeper and all that, but nevertheless, she complained about her troubles with her back.

Q. Now then about how often would she complain about that?

A. Whenever the work got a little much—too much for her, or whenever it piled up on her, or anything like that.

Q. In terms of frequency, how many times a year, or a month, or week, or whatever it was, what would that be?

A. Well, it was two or three times a week.

Q. And when did you separate from Mrs- Thomson?

A. October 5, 1952.

Q. Now then, you were not divorced until some time later, is that correct?

A. Yes, sir, the following year, in August.

Q. Now then, are you claiming any benefits or anything else out of this trial?

A. No, sir.

[fol. 145] Q. Have you signed this instrument?

A. Yes, sir.

Q. Thank you.

If it please the Court, we desire at this time to file a disclaimer, which I think will solve one of our legal problems.

Now, Mr. Thomson, you and Mrs. Thomson had three children, is that correct?

A. Yes, sir.

Q. Now, in this divorce it was agreed, was it not, that Mrs. Thomson's aunt should keep the children, was it not, at one time?

A. Yes, sir.

Q. And did she keep them?

A. Yes, sir.

Q. And did you or did you not provide any support for those children while Mrs. Thomson's aunt was keeping them?

A. Yes, sir, I did.

Q. And then what happened in regard to the children?

Mrs. Tarpely: If the Court please, we submit that in view of the disclaimer that this involuntary plaintiff has filed that any matters as between him and the plaintiff related to whether or not the children were supported, it is unimportant in view of his involuntary disclaimer, we submit the evidence is no longer relevant.

The Court: We are inclined to think the objection is well made, Counsel.

[fol. 146] Mr. Look: Your Honor, this is in rebuttal to some evidence introduced by the plaintiff to the effect that the children had not received any support.

The Court: That evidence came out before the disclaimer came in.

Mr. Look: That is all.

Cross-examination.

By Mrs. Tarpley:

Q. Mr. Thomson, what was Mrs. Thomson doing when you first met her prior to your marriage?

A. She was an agent-operator at Maringouin, Louisiana at the time I met her.

Q. Working for the Texas & Pacific Railway, is that right?

A. Yes, ma'am.

Q. Did she continue to work the T&P for some time after you were married?

A. No, just a few weeks.

Q. Just a few weeks?

A. Uh-huh.

Q. And then she resigned?

A. That is right.

Q. And during most of the rest of the time that you lived together as husband and wife she was just a housewife, is that right?

A. No, ma'am. She worked as a Nurses' Aide, or whatever it is, at a hospital. She worked as a waitress in a cafe. I believe that is all.

[fol. 147] Q. Other than the times when she was occupied with those two jobs she was a housewife, is that correct?

A. That is right.

Q. All right, I believe you said a moment ago that three children were born to your marriage?

A. Yes, ma'am.

Q. Were those children born by normal birth or by Ceasarian section?

A. Normal birth.

Q. Normal birth. I believe your last two children were twins, is that right?

A. That is right.

Q. When were those twins born?

A. In forty—well, let's see? They are nine years old. '45. That is right, '45.

Q. '45?

A. July, '45.

Q. Or was it '46?

A. Now, it could be '46.

Q. Following the birth of those twins did your wife have surgery of any type?

A. Yes, ma'am, she did.

Q. All right, what type of surgery did she have?

A. The removal of some of her organs.

Q. Now, what doctor performed that operation?

A. McConnell at Bunkie, Louisiana.

Q. Was he a T&P employee, doctor?

A. I really don't know.

Q. You don't know. All right.

Following that operation did your wife continue to complain of backaches and cack trouble?

A. Yes, ma'am.

Q. Is it your testimony that she did?

A. Yes, ma'am.

[fol. 148] Q. Did her health improve in any manner after that operation?

A. The part of her health that this particular part was supposed to have cured it seemed to me it only agitated it.

Q. I see. It is your testimony then that the operation did not, so far as you could observe, improve your wife's health in any manner?

A. The only benefit she received from it was the fact she could not have any more children.

Q. Now, does the T&P Railway Company require a physical of its employees before they are hired?

A. Yes, ma'am.

Q. And your wife had resigned from the T&P?

A. Uh-huh.

Q. Immediately following your marriage?

A. Uh-huh.

Mrs. Tarpley: I see. That is all.

Mr. Look: No questions.

Your Honor, we are down to our medical testimony, and if we could take a morning recess now we would like to see if they are available.

The Court: All right.

Is your doctor available?

Mr. Look: I think they are, sir.

[fol. 149] The Court: All right, the Court Crier will announce a ten minute recess.

(Short recess.)

Dr. J. E. Hill, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. Would you state your name, please, Doctor?

A. J. E. Hill.

Q. And are you duly licensed to practice medicine in the State of Texas?

A. Yes, sir.

Q. Is your license on file with the County Clerk?

A. It is.

Q. What is Marshall the county seat of?

A. Harrison County.

Q. Harrison County.

Doctor, will you please give a brief resume of your medical education and experience?

A. I am a graduate of the University of Texas Medical, 1918; my entire service has been in Marshall with our T&P Hospital Association, Hospital System.

Q. Now, what is your position with that Hospital System at the present time, Doctor?

A. I am now Chief Surgeon of the T&P Railway Hospital Association and Chief Surgeon of the Texas & Pacific Railway.

Q. And you have been, you said, in Marshall, at that same hospital all that time?

[fol. 150] A. Yes, sir.

Q. Now, as the Chief Surgeon are you in general supervision of all professional services in that hospital?

A. I am.

Q. Now, Doctor, do you have any record of any treatment, or, knowing Mrs. Thomson in the year 1953?

A. I have.

Q. Did you at that time have x-rays made of Mrs. Thomson under your supervision and direction?

A. Yes, sir.

Q. Do you have that with you, sir?

A. Yes, sir.

(The instrument above referred to was here marked Defendant's Exhibit Number 6, for identification.)

By Mr. Look:

Q. Doctor, would you come down here, please?

Doctor, is this the x-ray to which you refer?

A. Yes, sir.

Mr. Look: We offer in evidence Defendant's Exhibit Number 6.

By Mr. Look:

Q. Now, wrong side out or right side out, Doctor?

A. Let's put it here, we can see our numbers.

Q. Now, Doctor, with regard to this x-ray, do you find any abnormalities or anomalies?

A. I do.

Q. Would you point them out, please sir?

A. We have a spina bifida occulta, it is where the vertebral arches have never developed and have failed to extend and cover the spinal cord; it is a failure of union. [fol. 151] You can see this line right, here on these vertebrae here you see these nubs sticking out on down, but it is lacking in this place, and you see the dark line here where it fails to unite.

Q. What vertebra is that, Doctor?

A. That is the fifth lumbar.

Q. And do you see any other anomalies on that x-ray?

A. We have a narrowing of this fourth lumber in this

respect here, on the left is much narrower than on the right. We have a reverse condition on the left of the fifth lumbar, not as marked as on this. We have these little pieces of bone sticking out from each vertebral bodies, called transverse processes.

Q. Doctor, will you speak a little louder? And can you stand back a little? I don't believe everybody can see.

A. We have in the fifth lumbar these transverse processes, we have a double one on the fifth, which is an abnormal condition.

Q. Doctor, what is this area right up here, to which I am pointing?

A. That is some, probably some arthritis mixed with calcification in nature's effort to strengthen the weakened back.

Q. Now, by "weakened back", do you mean a weakness caused by this?

A. Yes, sir.

Q. Non-joinder here——

A. Yes, sir.

Q. Non-joinder here——

A. Yes, sir.

Q. —of the wall of the vertebra?

A. Yes, sir.

Q. And do you see any other abnormalities or anomalies?

[fol. 152] A. Well, there is quite a narrowing of this interspace between the fourth and fifth lumbar.

Q. And, Doctor, that x-ray was taken when?

A. That was taken on the 9 and 29, 1943; and there is also the number, the serial number, and the number corresponding to my file.

Q. Thank you, Doctor, will you have a seat, please, sir? What were you treating Mrs. Thomson—I believe her name was Sanford then.

A. Rubynelle Sanford, yes, sir.

Q. What were you treating her for at the time?

A. She came in with a complaint of lumbosacral pain and at that time she had some rather bad tonsils, and she being a minor then we had to get permission from her father to have her tonsils out.

Q. Now, Doctor, if a person is complaining of tonsils is it normal to, if that is all, for a doctor to order x-rays of the lumbar spine?

A. No. The reason I made this of the lumbar spine was the complaint of this low back pain.

Q. Now, is there anything in the x-ray that you have seen there that would tend to cause low back pain?

A. Yes, sir.

Q. What, sir?

A. Well, the lack of development, the narrowing of the space, the difference in the longitudinal measurement of the two vertebrae, and the excess calcium deposit in this fifth vertebra.

Q. Now, Doctor, that excess calcium deposit you are referring to, would that or would that not have a tendency, as years progressed, to increase and increase?

A. It would.

Q. Now, Doctor, would you step down here just a moment again, please, sir?

[fol. 153] Now, Doctor, I show you what is Plaintiff's Exhibit Number 6 and ask if you find any conditions in that x-ray that were similar to those in Defendant's Exhibit Number 6.

A. They are very similar, yes, sir.

Q. Now, where are the similarities, Doctor?

A. It is the narrowing of the interspace. This does not cover the full vertebra, I can't tell about the measurements. The narrowed interspace, of the slant there, and the marked calcification in this area right here.

Q. Now, I show you Plaintiff's Exhibit Number 4 and ask if you find any similarities between it and Plaintiff's Exhibit Number—and Defendant's Exhibit Number 6?

A. I do.

Q. Would you point them out, please, Doctor?

A. Well, it is a narrowed interspace, the excess calcium; this shows very nicely the longitudinal measurement on the left as being less than on the right. That is, from here, as compared to from there to there.

Q. And, Doctor, do you see any evidence of any spina bifida occulta, or not?

A. Yes, sir.

Q. Where is that, Doctor?

A. Right here.

Q. Is that in the same position that it was in the 1943 x-ray?

A. It is.

Q. Now, Doctor, this real light mass here, what is that?

A. That is a lime deposit.

Q. Is that what you were referring to as excess calcification?

A. Yes, sir.

[fol. 154] Q. Now, I show you Plaintiff's Exhibit Number 8 and ask you if you find any similarities between Plaintiff's Exhibit Number 8 and Defendant's Exhibit Number 6, the 1943 x-ray?

A. I do. As stated previously, we have this area, we have our narrowing of the interspace, and what I mentioned awhile ago, we have this double transverse process which has been present in all of them.

Q. That has been present in each of the x-rays?

A. Yes, sir.

Q. And Doctor, considering the fact that Mrs. Thomson was some eighteen years old in 1943, and in 1953 was some twenty-nine or thirty years old, with that condition, and with the calcification, would that or would that not be a normal process of growth?

A. Yes, it would. Nature is attempting to strengthen the spine there.

Q. And, Doctor, as that calcification grew, would it have or would it not have a tendency to move up on these pictures to narrow, further narrow that space?

A. Well, you will see, naturally, up to 29 there would not be any narrowing, but naturally, as age comes along this space becomes narrower, walking, and in an upright position all the time, they are bearings in there, or——

Q. I am talking about the effect of the calcification to make up the weak back, what is that effect?

A. Oh, it would tend to increase.

Q. Thank you.

Now, Doctor, do you have with you any other x-rays made there in Marshall of Mrs. Thomson?

A. Yes, sir.

(Instruments were here marked Defendant's Exhibits Numbers 7, 8, 9 and 10, for identification.)

[fol. 155] Q. Now, Doctor, referring to what has been marked as D-7 through D-10, I ask you when they were made?

A. Let me—they were made on the 4th-23rd-54.

Q. All right, Doctor, I ask you what that is a picture of?

A. The purpose of this series of pictures, she entered this hospital with a history of hematuria or blood in her urine, and she was referred to the urologist who ran this series of pictures in making his diagnosis.

Q. And, Doctor, for what purpose were these pictures taken? Were they taken for the purpose of showing the back or other parts of the body?

A. They were taken for the purpose of investigating the urinary-kidney and bladder regions.

Q. And then the purpose was not particularly to show the back?

A. No, no, they were just——

Q. Now, Doctor, looking at Defendant's Exhibit 7 there, and all these pictures were made for the same purpose, were they not?

A. Yes, sir.

Mr. Look: We offer in evidence Defendant's Exhibits 7 through 10.

Mrs. Tarpley: No objection.

By Mr. Look:

Q. Although these pictures—they do, incidentally, show the back, do they not?

A. They do, yes sir.

Q. Do you find any similarities between Defendant's Exhibit Number 7 and Plaintiff's Exhibit Number 4?

[fol. 156] A. We have got the usual narrowing, the usual excess ca-cification and double transverse process as in these previous pictures.

Q. All right.

And, Doctor, Defendant's Exhibit Number 8, now, for what purpose was that picture made?

A. Investigating the kidney, urinary tract.

Q. Now, what is this area in here, this white area?

A. She was given intravenous dye in order to bring out the pelvis of the kidney, as to kidney function, and the details of the interior of the kidney pelvis, and check it as you go on down the tubes here, and here is some that has gone into the bladder.

Q. Now, how about that picture, Doctor, is the same true, or not?

Mr. Alvis: What is that?

A. The same is true of these.

By Mr. Look:

Q. Defendant's Exhibit Number 9.

A. You run a series of these, we first run a flat plate without anything, and then inject the dye and take five, seven, fifteen, on up to how many pictures, according to how the dye is being excreted.

Q. Do you find the same situation in the view there as you do in the other picture?

A. I do, yes, sir.

Q. Defendant's Exhibit Number 10, is the same thing true of that, Doctor?

A. It is.

Q. Were all of these pictures made at the same time, Doctor?

A. Yes, sir.

[fol. 157] Q. In 1954?

A. Yes, sir.

Q. That was 4-23-54, I believe?

A. Yes, sir.

Q. That is Defendant's Exhibits 7 through 10.

And, Doctor, was she, at the time, in 1954, making any complaint of any injury to her back?

A. I never heard any complaint from an injured back from Mrs. Thomson, no, sir.

Mr. Look: Pass the witness.

Cross-examination.

By Mrs. Tarpley:

Q. Dr. Hill, in 1943 when you first made these x-rays of Mrs. Thomson was she complaining of anything else other than her tonsils and this lower back pain?

A. Not that I know of. I have no knowledge.

Q. Did you have occasion in 1943 to examine her female organs and their processes?

A. No, ma'am.

Q. You did not?

A. No.

Q. Did you make any recommendation to her in 1943 with reference to having surgery for the purpose of having her female organs removed?

A. I have no recollection of it.

Q. You did not?

A. No.

Q. Doctor, I will ask you if you will take another look at Defendant's Exhibit 6?

I believe that you have previously pointed out that there is a narrowing of the interspace there?

[fol. 158] A. Yes, ma'am.

Q. It that correct?

A. Yes, ma'am.

Q. Now, what does a narrowing of the interspace indicate to you?

A. It means that the disk could possibly be herniated; the disk could be degenerated.

Q. I see.

A. In other words, it is a pad, it is a bumper to keep bone from rubbing against bone.

Q. The disk is what is normally found between——

A. Yes.

Q. —the various vertebrae?

A. Yes.

Q. Is that correct?

A. Yes, ma'am.

Q. Now then, the condition that you find here in Defendant's Exhibit 6, made in 1943, does that indicate that there is no disk whatsoever?

A. I would say if there is a disk there it is a very much narrowed disk.

Q. A very much narrowed disk?

A. Yes. It may never have developed or it may have wasted away.

Q. I see.

A. It may have herniated, I couldn't say.

Q. There is what you would call a narrowing of the space?

A. There is.

Q. And you are unable to tell from the x-ray——

A. No.

Q. —whether there was any disk or not?

A. No.

Q. All right, I will ask you to look at Plaintiff's Exhibit Number 4 and I will ask you if the condition that you have previously pointed out to us is worse or better [fol. 159] than the condition that you found in Defendant's Exhibit 6?

A. I think there is probably more calcification here. Now, this does not look quite as narrow; now, I will say this, that the angulation will at times make one picture look a little wider than the other one.

Q. I see. And, of course, you do not know the particular angulation on that?

A. No, this does not look quite as tight, I believe, as one of those others we looked at, but it definitely still shows a narrowing.

Q. All right. Now, Doctor, what are these two white spaces shown over here?

A. Oh, that is the iliac crest.

Q. I see. Is that what we call the sacro-iliac?

A. This is the sacro-iliac joint.

Q. I see. Do you notice any abnormality, or any abnormal spacing of that iliac joint?

A. Those vary a great deal. I would not say it was markedly—I would say it was within normal limits.

Q. Do you find that one sacro-iliac, or one-half of it, is higher than the other?

A. You mean the sacro-iliac joint or the crest?

Q. That crest.

A. Oh, the crest. It looks like the left, from this, is a little higher. Now, it might be that is due to the tilt of the pelvis.

Have you got one that has the same area of the picture in the public zone?

Q. Let's see, this is yours. All right now, Doctor, we will look at Plaintiff's Exhibit 8.

A. Yes, ma'am. Yes, this is the right. The left is somewhat higher, yes, the left is somewhat higher than the right.

Q. That is a condition you didn't point out in these x-rays made in 1943?

[fol. 160] A. Yes. Now, of course, you will notice part of that is due to the large part of the sacrum on this side, this sacrum is much larger, comes up much higher on this side than it does on this side.

Q. Thank you, Doctor.

A. Yes, ma'am.

Q. Now, had you had occasion to see or examine Mrs. Thomson between—have a seat, if you will, Doctor—to see or examine Mrs. Thomson between 1943 and 1954 when this second series of x-rays was made?

A. No, ma'am.

Q. You had not seen her in that time?

A. No.

Q. Now, Doctor, would you say, based on your x-rays made in 1943, that a person with a spine in that condition, assuming otherwise physically healthy, would be capable of bearing children normally?

A. Yes, ma'am.

Q. All right.

A. Yes, ma'am.

Q. Now, with reference to the x-rays you made in 1954 and the conditions you there found, would you believe that the person would still be capable of bearing children?

A. If their generative organs were in good condition, yes, ma'am.

Q. You think they would be capable though?

A. Yes, ma'am.

Q. Now, Doctor, I believe you have indicated that this is a condition which grows worse as time goes on, is that correct?

A. I would say yes.

Q. Now, Doctor, what effect would an injury or a strain have on a back in this condition?

A. Well, it would not be good for it.

[fol. 161] Q. I see.

A. No.

Q. What effect, so far as what you can see in the x-rays, would an injury have on this condition? Would it hasten this change that you have noted?

A. It could possibly increase the calcification, yes, ma'am.

Q. I see. Is it possible for you to tell from your x-rays, Doctor, what part of the calcification might have come from an injury and what part might have come naturally?

A. I think it would be very difficult to make a positive statement.

Q. It would be very difficult to tell?

A. Yes, ma'am.

Q. Would an injury produce this calcification that you have talked about?

A. If there had been bony damage at the time of her injury it should have.

Q. I see. Do you know of any treatment for a spine in the condition that these x-rays show to be.

A. Well, I think in a case like this, if they were going into it thoroughly they should be in the hands of a good orthopedic man, as well as a good neurological man. I think some myelograms should be done. That is, inject some oil that is opaque *of* x-rays, and inject it in the spinal canal to determine if there was any obstruction in the canal. If that was found negative, normal, I think a fusion across this area would be the indicated treatment.

Q. A spinal fusion?

A. Yes, ma'am.

Mrs. Tarpley: That is all, Doctor, thank you.

[fol. 162] Redirect examination.

By Mr. Look:

Q. Doctor, you would expect the calcification you have testified to to continue regardless of any injury or not, would you not?

A. I would.

Mr. Look: That is all. Thank you, Doctor.
Mrs. Tarpley. Stand down.

Dr. D. L. Bell, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. State your name, please, Doctor Bell?
A. D. L. Bell.
Q. Do you have a degree?
A. Yes.
Q. An M.D. degree?
A. I do.
Q. Are you a regularly licensed physician?
A. I am.
Q. Is your license on file in any county of the State of Texas?
A. It is.
Q. What county?
A. Ward.
Q. Doctor, where do you live?
[fol. 163] A. I am now in Hobbs, New Mexico.
Q. How long have you been in Hobbs?
A. Well, since the 1st of the year.
Q. Where were you before that?
A. In Monahans, Texas.
Q. And Doctor, will you give us a brief resume of your medical education and experience and training?
A. Well, I was graduated from the Medical School of the University of Chicago and I interned a regular internship in Chicago and I served a residency in Louisiana Charity Hospital and I was accepted into the International College of Surgeons in 1953 in New York City.
Q. And how long have you practiced medicine, Doctor?
A. Oh, let's see? I finished my internship in '37; it would be eighteen years since I have been licensed.

Q. Now, Doctor, did you own and operate a hospital in Monahans?

A. I did.

Q. What was the name of that hospital?

A. The Bell Hospital.

Q. Did you ever have any occasion to treat Mrs. Rubynelle Thomson?

A. I did.

Q. As a physician?

A. Yes, sir, yes, sir.

Q. Did you ever have any occasion to have her in your hospital?

A. Yes, she was admitted in December of '52, I believe.

Q. Now, Doctor, the hospital you operated there, that was a regular hospital where patients stayed and had nurses, and where you would be in attendance, is that correct?

A. That is correct. And the other doctors in the town used it also.

[fol. 164] Q. All right. Now, Doctor, what type of records were kept on patients in that hospital?

A. Well, we had the regular, routine nurse's charts and nurse's notes and medications recorded.

Mr. Look: Mark that.

(The instrument above referred to was here marked Defendant's Exhibit Number 11, for identification.)

By Mr. Look:

Q. Now, Dr. Bell, I hand you what has been marked Defendant's Exhibit Number 11. Now, this pink page, what is this, Doctor, if you know?

A. That is the orders where the doctor gives his orders to be carried out in treatment of a patient.

Q. To whom are those orders given?

A. To the nurse in charge at the time.

Q. Now, Doctor, what are the remainder of these sheets? What are they called?

A. They are the nurse's chart, or notes.

Q. Now, in regard to nurse's chart or notes, Doctor, what is the—were they kept on all her patients at that time?

A. Oh, yes.

Q. And what was the *u*rocedure for keeping those? I mean, who does what and when?

A. Well, usually, the tour of duty is divided into three shifts.

Q. Yes, sir.

A. Where you have round the clock business, and the nurse's chart, the medications and any complaints or any thing unusual regarding the course of the patient's stay in the hospital.

[fol. 165] Q. By charting them, do you mean, Doctor, by writing them down?

A. Oh, yes.

Q. Is it on these charts?

A. Oh, yes, they make their notes if they are not sleeping, if they are having pain, and things of that nature.

Q. Is it more or less a diary of a patient that the nurse makes, is that it, Doctor, is that what you would call it?

A. Yes, that I think would be correct.

Q. Doctor, is an entry made at all whenever medicine is administered, or not?

A. Yes, yes, the time of the day is put down on the chart.

Q. And the type of medicine, is that recorded or not?

A. Yes.

Q. And when a patient leaves the hospital what happens to that record?

A. Well, it is filed away in a permanent file.

Q. And those are kept on all patients in the regular course of business at that hospital, Doctor?

A. Yes, sir.

Q. Now, Doctor, the record, the Defendant's Exhibit Number 11 that you have there, is that such a record?

A. It is.

Q. Upon whom?

A. Ruby Thomson.

Mr. Look: May it please the Court, we offer in evidence Defendant's Exhibit Number 11.

Mrs. Tarpley: If the Court please, we object to the introduction of that exhibit for the reason that there has been no testimony or proof that it was made under the

[fol. 166] personal supervision or direction of this witness; it has not been properly identified; it has been shown to have been made by someone else who is not here in the Courtroom, and it would certainly be hearsay as to us, and we object to it on that ground.

Mr. Look: We are offering it, Your Honor, under the exception of entries kept in the regular course of business.

The Court: I did not notice your questions on that point. Has the witness testified that it is the record of the hospital, ordinarily kept, and is kept in the due course of business?

Mr. Look: Yes, sir.

The Court: It is admissible.

(Defendant's Exhibit Number 11 is as follows:)

Defendant's Exhibit 11

BELL HOSPITAL AND CLINIC

MEMPHIS, TEXAS

PHYSICIANS DRUGS AND UNIT

NAME Thompson, Sudy Room No. Ward No. 4 Bed Dr. Bell Case No.

DATE	NOTES
12/5/54	1) Carbital 1 tab
	2) Chloramphenicol Caps 1 tab
	3) Aspirin tabs 2 tabs
	4) Gel 1 tsp
	5) Lucose 5% W.O.A. Bottle
12-8	Disc Chloramphenicol

BEDSIDE NOTES

Name _____ Physician _____

Date _____ Room No. _____ Medical No. _____

Hour	Temp	Pulse	Resp.	Urine	Stools	Medicine	Stimulant	Nourishment	Remarks
3 15									pt. left hosp. to pat. car - J. Tackett

FORM 810 — [illegible]

7

BEDSIDE NOTES

Name Thompson, Rusby Physician Bell

Date 12-8-52 Room No. 4 Medical No.

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Stimulant	Nourishment	Remarks
11									Mother of Matthew on duty 70 C.R.
12						12/9 52 Tuesday			
2						Pyridium tab 2			O'daly
2									Age asleep No complaints
6	98					Pyridium tab 2		Reg	O'daly
12									Good I have Matthew Matthew Started when I went it burns like fire
7									Mildred R.N.
8									Russell R.N. Bath general care Made Comf. Ok Bell Ans Out of room Rubbing
12	99							Regular	Ate well
4						Pyridium tab 2			Rubbing
12	99								No Complaints A good shift Russell RN

FORM 315 — [illegible]

6

BEDSIDE NOTES

Name _____ Ward _____ Bed _____ Physician _____

Date 12-8-52 Room No. 4 Medical No. _____

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Complaint	Appointment	Remarks
12	98	Reported Continued							
1									Sleeping
	97					Temperature 2 Tbs q.g.			Good Color
						Pyridium ÷		Regular	Appetite
									good & Color
									good
7									Mouth Wash
									N. Parkin.
									A. M. Care.
4									upon Chair
									to Bed in
									to Room.
									no complaints
10	98			-					to B.R.
11:30								Regular	Good Appetite
12:00						Pyridium tabs			Resting
1									Comfortable
2	98								Bed Linen Changed
3									Comfortable
									Quiet Night
4									visitors
5									ate well
6	98					Pyridium tabs		Regular	Comfortable
7									
8									
									visitors
12									Good Night
									J. McKeith

FORM 510

5

BEDSIDE NOTES

Name _____ Physician _____

Ward _____ Room No. _____ Hospital No. _____

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Dressings	Nourishment	Remarks
11:30								Reg	Good Appetite
12:00						Terramycin 250 mg Pyridium tab			
									No Complaints
1:00									Quiet
2:00									A good a.m.
2:30									Grimes R.N.
									healthy + Tasteth
4:00									on Duty
5:00								X&O	in room
6:00	98.6					Error ~~Observation chart~~ ~~Temperature~~ Terramycin 250 mg Pyridium tab +		Regular	ate well
6:45									orally
7:00									up to B.R.
8:00						Rachel Tuth -			quiet
9:00						Terramycin 250 mg			orally -
								7UP Tea	grand
10:00									P.M. care
									a good L.M.
									H. Lungfoy
11:00									Mathys + Tatheo
									are duty
									at 2:00
12:00						12/P 32 Wendesy			
						Pyridium + Tab			Orally
						Terramycin 250 mg			and
						Ascbital +			~~Accompanied~~ Stef

FORM 316 — THE HOSPITAL SERVICE CO. OF SOUTH CAROLINA

4

BEDSIDE NOTES

Name _____ Physician _____

Date _____ Room No. _____ Medical No. _____

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Stimulant	Nourishment	Remarks
12-6-52			Rupert Cant -						
4:00									Quiet
5:00								Regular	Ate well
6:00	98°					Chloromycetin 250 mg.			given
7:00									Hg in Rall
8:00									Back rub.
9:00						Carbitol			
						Chloromycetin 250 mg.			
10:00									Quiet
									S Boyd
11:00									Watkins et Motley
12:00						December 7, 1952			Sunday
						Chloromycetin 250 mg			Orally
						Pyridium tab ÷			Orally
								Water	@ bedside
2:00									Resting
4									quiet
5								Hg 0	To BR.
6	98°					Chloromycetin 250 mg			AM care
7						Pyridium ÷		Regular	orally tolerated well
									Dr.
9:00									A. Mundell RD
									and Nurse
8:00									Bath & general
									care
									Made Comf
9:00						Terramycin 250 mg			Lights
						Carbitol Cap ÷			Rest
10:00	98								Voids Bed Rest

FORM 215 — THE HOSPITAL RECORD CO., HOUSTON, TEXAS

3

BEDSIDE NOTES

Name Thompson, Ruby — Physician Dr. Bell

Date 12-6-52 — Room No. — Medical No.

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Stimulant	Nourishment	Remarks
11:00									Malley + Lunthy on
12:00				12-6-52		Saturday			
						Chloromycetin 250 mg			orally
						Pyridium tab ½			orally
									Ft. Williams
3:00						Chloromycetin 250 mg			orally
								2128	
6:00	98					Chloromycetin 250 mg			
						Pyridium tab ½			orally -
									a.m. Care
									a good Shave
									Lunthy
7:00									Eddleman to
									Russell Rd, Sun
						Pyridium tab ½ q 4 p.c. & h.s.			Gym Cap —
9:00						Chloromycetin 250 mg			Lestray
						[illegible]			Voiding frequently
							Seconal		Ate well
12:30	98.6					Chloromycetin 250 mg			as Complained -
						Pyridium tab ½			Orally
2:00									Resting
2:00	98					Chloromycetin 250 mg			Orally -
									Feeling better
									Dr. Bell was
									Seen
3:00									Capt Lunthy
									on Duty
								H2O	at Bedside

FORM 316 — THE HOSPITAL BEDSIDE CO., WICHITA, KANSAS

2

BEDSIDE NOTES

Name Thompson, Ruby — Physician Bell

Date 12/5/52 — Room No. 4 — Medical No.

Hour	Temp.	Pulse	Resp.	Urine	Stools	Medicine	Symptom	Nourishment	Remarks
1						Ph. 11 Rx			Asleep at present
						Carbital ℈			for rest
						Chloracamphen Cpd			Complaining of
						Aspirin Tabs			burning on
									urination
						Penicillin 400,00			Had 1 thing
						Vanes ℈ saline			of orange juice
						10% Glucose in Water		IV	started
						ā Dextrose			slowly by
									Dr Bell
									Dr Bell out of
									the room
									Dr Stanley
									in to see
4									Patient
									Dr Bell
									Dr Stanley
5									Awakens & Drinks
									an orange
									juice
2								H₂O	in room
4						10% Glucose in H₂O			added to I.V.
5						I.V. discontinued			all sol. absorbed
6	98			✓	✓		Legend		Took little
						Chloramphenicol 250 mg			Orally
						Pr dimenhydrinate			Orally
7				✓	✓	Tab ℈ Seconal 1½ gr			orally for rest
									Dr. Bell in
8									sleeping
9						Chloramphenicol 250 mg.			orally
10									A good Nite.
									F. Norton

FORM 318 — THE HOSPITAL RECORD CO., WICHITA, KANSAS

1

[fol. 175] By Mr. Look:

Q. Now, Doctor, this record runs from back to front, does it not?

A. Yes, sir.

Q. Doctor, I will ask you to examine this and state what medications were administered to Mrs. Thomson?

First, Doctor, I am sorry, for what period of time do those sheets cover Mrs. Thomson?

A. From 1:30 p. m. on December 5, 1952 to 3:15 on December—yes, the 9th, 1952.

Q. All right, sir I will ask you to go and look at that record and see what medicines were ordered administered to Mrs. Thomson?

A. She received, upon entering, a sedative for rest. She was complaining of severe burning and pain on urination, and she received a carbrital tablet, that is a sedative, and she was put immediately on chloromycetin.

Q. What is chloromycetin?

A. That is one of the new antibiotics that medical science has discovered and developed in the last three or four years.

Q. For what is that antibiotic used, Doctor?

A. For any infection.

Q. All right, what other medications did she receive, Doctor?

A. She was on Pyridium during the entire stay in the hospital.

Q. What is pyridium? What is that used for?

A. It is a urinary antiseptic.

Q. Is pyrid-um used to treat back ailments, Doctor?

A. I have never used it as such. I never heard of it other than in a—other than as a urinary antiseptic.

Q. And what other medicines did she receive?

A. She received some penicillin here, and demerol and glucose.

[fol. 176] Q. What was the glucose used for, Doctor?

A. That is to flush out the kidneys and the bladder.

Q. Doctor, any other medications that were given Mrs. Thomson?

A. Nothing but the glucose and the sedatives and the pyridium and the antibiotics.

Q. What was the purpose of the sedatives, Doctor?

A. Well, she was uncomfortable, and restless, and couldn't sleep.

Q. Doctor, was it the duty of the nurse on duty at the par/ticular time to record any information given them by the patient as to their well being?

A. Oh, yes, yes, they are supposed to make in their notes, or register all statements or complaints of any importance to the case.

Q. Doctor, what complaints appear in that record on behalf of Mrs. Thomson?

A. Well, let's see? Here is one place where she complains of burning and itching on urination. Here is another here in quotations, "When I urinate it burns like fire." That is in quotation marks.

Q. Doctor, are there any entries in there that reflect that Mrs. Thomson ever complained of any low back or leg pain?

A. No, there is not.

Q. Doctor, did you have facilities as that hospital to make x-rays?

A. Yes.

Q. Did you make x-rays of Mrs. Thomson?

A. No.

Q. If there had been a complaint of low back pain what is the normal and accepted procedure?

A. We would have made pictures.

Q. By that you mean x-ray pictures?

A. X-ray pictures, yes.

[fol. 177] We are in an area where we have lots of back injuries and back complaints, out in the oil field country.

Q. Now, Doctor, you had treated Mrs. Thomson as an out patient previous to her entry into the hospital, had you not?

A. Yes, she had been in a few times.

Q. And for what were you treating her?

A. This same condition, kidney and urinary bladder infection. We call it cystitis.

Q. Now, Doctor, that record that is kept there, it is used, is it not, by the treating doctor? That is part of the chart that he sees how a patient has gotten along, to know what to do for him, is that correct?

A. That is right.

Q. Now, Doctor, this cystitis, as you call it, as I understand that means any bladder infection, does it not?

A. Yes.

Q. Is it calculated to cause discomfort?

A. Oh, very much.

Q. And restlessness and pain?

A. Very much.

Mr. Look: That is all.

Cross-examination.

By Mrs. Tarpley:

Q. Would that condition of cystitis cause pain and discomfort in the area of the low back or in the area of the kidneys?

A. In the area of the kidneys. Now, we would say that the bladder is more or less the watch dog of the urinary system. In other words, the infection can either ascend [fol. 178] from below or come down from above, and in about two-thirds or seventy per cent of all bladder infections it originates in the kidneys; the other one-third from below, from the vagina or the urethra.

Q. Now, if Mrs. Thomson had complained of discomfort in the area of the kidneys or in the area below the waist, would you not have believed that was a result of cystitis?

A. No, I don't think so.

Q. Is there any discomfort accompanying this cystitis other than upon urination?

A. Not within—not with cystitis itself. I would say your main symptoms are frequency, urgency and nocturia, and burning on urination.

Q. I see. There would be no discomfort then at other times?

A. Not to amount to anything.

Q. All right now, Doctor, I will ask you to look at your hospital records again and see if those records indicate that any extra equipment was set up for Mrs. Thomson to keep her from having to get out of bed?

A. I do not see any here in the charts.

Q. Do not those records reflect that Mrs. Thomson was

furnished with what is known as a retention catheter so she didn't have to get out of bed to use the bathroom?

A. Well, that is often done to alleviate the burning and pain.

Q. I see. Is that done simply for the purpose of relieving pain?

A. Yes, that is the main thing.

Q. All right, as I understood the comment awhile ago, Doctor, the only discomfort accompanying cystitis is upon urination, is that correct?

A. That is the principal symptom.

Q. So that the movement of a patient in getting in and out of bed in order to go to the bathroom would not cause [fol. 179] any burning sensation or any discomfort, isn't that correct?

A. Well, it wouldn't cause much. It is the urine coming in contact with the mucosa of the urethra that causes the burning sensation.

Q. I see. Well, is it your testimony then, Doctor, that it would have caused discomfort to a patient suffering from cystitis to get out of bed and move around?

A. Oh, it would perhaps cause a little.

Q. Would it be the normal procedure to introduce this retention catheter for a patient suffering only from cystitis?

A. Not necessarily.

Mrs. Tarpley: Not necessarily. I believe that is all.

Redirect examination.

By Mr. Look:

Q. Doctor, you testified that the bladder is the watch dog of the urinary system, is that right?

A. That is pretty much right, yes.

Q. And cystitis, infection of the bladder, you say usually —most of the times comes from the kidneys?

A. Yes, sir.

Q. Now, if it does come from the kidneys would there be any pain connected in or around the kidneys?

A. Yes, sir, she can have backaches, or he, or whoever it might be.

Mr. Look: That is all.
[fol. 180] Mrs. Tarpley: That is all.

Dr. George Thurman, a witness produced on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Look:

Q. State your name, please, sir?
A. Dr. George Thurman.
Q. You have a Doctor of Medicine degree?
A. Yes, sir.
Q. Would you please outline generally for the Court your medical education and experience and training?
A. Well, I had the customary pre-medical school education, followed by four years in medicine at Baylor Medical College in Dallas; followed by a year's internship, and then sessions of postgraduate work at Cook County Hospital in Chicago.
Q. And how long have you been practicing medicine, Doctor?
A. About seventeen years.
Q. You are licensed to practice, of course, and is it on file with the County Clerk or District Clerk of Taylor County, Texas?
A. Yes, sir.
Q. Now, Doctor, did you, at my request, examine Mrs. Rubynelle Thomson?
A. Yes, sir.
Q. When, sir?
A. The 20th of this month.
Q. What did that examination consist of, Doctor?
[fol. 181] A. A general physical examination with emphasis on the back.
Q. And did you make any x-rays?
A. Yes, sir.

Q. Do you have them with you, sir?
A. Yes, sir.

(Instruments were here marked Defendant's Exhibits Numbers 12, 13, 14, 15 and 16, for identification.)

By Mr. Look:

Q. Now, Doctor, I show you what has been marked Defendant's Exhibit Number 12 and ask you what that is?
A. That is a front view of the lumber spine.
Q. Of whom?
A. Mrs. Thomson.
Q. Now, was that picture, and let's see these, Defendant's Exhibits 12, 13, 14, 15 and 16, were they each made under your direction and supervision?
A. Yes, sir.
Q. Were they each made on the same date?
A. Yes, sir.
Q. And they are each of Mrs. Thomson?
A. Yes, sir.

Mr. Look: We offer in evidence Defendant's Exhibits 12 through 16.
Mrs. Tarpley: No objection.

By Mr. Look:

Q. Now, Doctor, what did you see in this x-ray of any note?
[fol. 182] A. Well, the changes of note are in the lower portion of the lumbar spine, this segment here. These five vertebrae constitute the lumbar spine, one, two- three, four and five.
Q. Now, Doctor- I see a little object you have here, you brought in. What is this?
A. That is a plastic model of the lumbar spine.
Q. And so then these are one, two, three and four—no, one, two, three, four and five, they are the same as on there?
A. Yes, sir, this is one, two, three, four; and five is not visible because of the tilt.
Q. Doctor, what do you see in regard to L-5 and L-4 if anything?

A. Well, there is obviously some narrowing of the space between the fourth and fifth. That would be here. Allowing those bodies to come close together, relatively speaking.

Q. There is a ruler over there, Doctor, if you want to use it.

A. That would be this space here.

Q. Yes, sir. Now, Doctor, this line here, what is that?

A. This line here?

Q. This right there, yes, sir.

A. This line right here. Well, that is a condition called spina bifida, which is a congenital defect.

Q. By "congenital" you mean born with it?

A. Born with it. It is a failure of the spinous processes to fuse.

Q. And does that have the effect of generally weakening the back?

A. No, sir.

Q. And does that mean that these two sides did not grow together?

[fol. 183] A. That is right. Is it all right to demonstrate on this?

Q. Yes.

A. Well, this arch of bone houses the spinal cord back here. It fails to fuse together, leaving a little crevice in this region, and you see it on the x-ray as a line, an opening.

Q. Do you say the space between the vertebrae has obviously been narrowed? What do you mean by the space between there?

A. Well, this space between each pair of vertebrae is filled in with cartilage, which does not show in x-ray, and when that cartilage degenerates or fails to develop, why, that space is narrowed. There is nothing in there, or not as much cartilagenous material as normally is present.

Now, these spaces here are open. Now, this space here is narrowed, and these are the spaces I am talking about.

Q. Now, Doctor, is there anything else of interest in this picture?

A. Yes, sir, there is an abnormal transverse process on the fifth lumbar vertebrae, it has two projections on it, one here and one here, which you don't ordinarily see.

Q. Now, would you point out on your model what you mean by transverse process?

A. These little projections that protrude from each vertebra that point out transversely from the segment. This one has a little knob on it here, and one up here. That is the left of the fifth.

Q. Is there anything else of interest on that picture, Doctor?

A. No, sir.

Q. How about Defendant's Exhibit Number 13? What view is that, Doctor?

[fol. 184] A. That is a view of the pelvis, and there is nothing of note there. The changes we mentioned in the lower lumbar portion can be seen in that film also.

Q. Nothing additional?

A. No, sir.

Q. That was not seen in the other film?

A. That is just an AP view of the—it is upside down, sir.

That is just an AP view of the dorsal spine up in the chest region, and the lumbar *s*uine.

Q. By "AP" you mean front to back?

A. Front to back, yes, sir.

Q. And, Doctor, what is that?

A. That is a side view of the lumbar spine, this view, the raise going in on the side.

Q. Do you note anything there?

A. Here you see the marked narrowing of the space between the fourth and fifth segments the fourth and fifth, this space right here, it is not open like these.

Q. Doctor, do you find any evidence of any *ra*thritis on any of these?

A. Put up the front-back view again?

Q. Of the dorsal?

A. No, sir, the lumbar.

I thought there was a little density, a little sclerosis, possibly, around this joint here, which would lead one to believe there was some arthritic change there. Now, that is just a spot film of the region in question. This is the fourth and this is the fifth lumbar segment and this is the intervertebral space.

Q. Is that this space in between here and there, Doctor?

A. Yes, sir.

Q. Anything else of note on there?

A. No, sir.

[fol. 185] Q. Thank you, Doctor, have a seat.

Now, Doctor, what did your physical examination consist of of Mrs. Thomson?

A. I did a neck, heart, lungs, blood pressure, abdominal.

Q. Just a general physical?

A. Yes, sir.

Q. Checkup? Now, as a result of your examination, in your examination did you take into account any history given by Mrs. Thomson to you?

A. Yes, I did.

Q. And what history did she give you?

A. She told me that she developed low back pain in December of 1952 while pulling a mail truck that weighed some three hundred pounds, in the employ of the T&P Railway Company.

Q. Now, Doctor, did she give you any history of any back pain before that time at all?

A. No, sir.

Q. Now, Doctor, assume that Mrs. Thomson, when a child, fell astraddle a fence, and further, when in school at one time a schoolmate pulled a chair out from under her and she struck her low back on the edge of the chair and that she had been suffering back pain at least since the age of eighteen years, would that enter into your diagnosis at all?

A. Yes, sir.

Q. Of this condition?

A. It would. It would make me feel that it was definitely possible for the changes seen in the x-ray, other than congenital changes, the ones we know she was born with, it would make me feel like they could have been initiated in her childhood or youth.

Q. Now, Doctor, it is true, is it not, that when there is an injury to the spine such as that, that the immediate [fol. 186] damage is not always immediately apparent? What I am getting at is, you said the degenerative processes started. Once started are they calculated to continue?

A. Yes, they may continue, or nature may arrest them at any given point.

Q. And, of course, it is almost impossible to tell when that will be, is it not?

A. That is right.

Q. Now, Doctor, from your x-ray examination and from your physical examination of Mrs. Thomson, do you have an opinion as to her general bodily efficiency?

A. Well, I don't feel that she is seriously incapacitated. My findings were largely subjective.

Q. By "subjective" what do you mean, Doctor?

A. Well, she told me she had back pain. She had tenderness to pressure over the part in question, the lower lumbar region. There is an absence of muscle rigidity which would be an objective finding, and the deep tendon reflexes in the lower extermities are active and equal, which is an objective finding.

Q. Now, Doctor, the difference between subjective and objective findings, is it not that the object is what you can determine without relying upon what the patient tells you?

A. That is right.

Q. Is that true?

A. Yes, sir.

Q. Now then, this muscular rigidity, how do you determine that?

A. Well, you have the patient stand erect in front of you and palpate the back muscles.

Q. By "palpate" what do you mean?

A. Feel with your fingers.

Q. Now, what does muscular right indicate?

A. It indicates a nerve root irritation.

[fol. 187] Q. What does the absence thereof indicate?

A. Well, it indicates that there is no nerve root irritation at that particular time.

Q. Now, the reflexes, the lower reflexes, you said they were equal in both, the deep tendon reflexes. What does that indicate? What does that test show?

A. If the nerve, as it makes its exit from the spine between the vertebrae, is pinched, why the impulse is cut off and the reflex would be absent, or diminished at least.

Q. Doctor, is that actually a hammer or something, and put it on the knee, is that what you are talking about?

A. Yes, sir.

Q. What happens to the body when that is struck? Does that strike upon a nerve, or what?

A. No, sir.

Q. Well, how do you test those nerves?

A. It doesn't strike on a nerve, in the true sense of the word, you — hitting a tendon, and you set off impulses through the tiny nerve filaments which go to the central nervous system and come back and activate the muscle producing the reflex.

Q. Doctor, if both reflexes are normal and equal what does that indicate?

A. Well, it indicates that the impulses are certainly not cut off or diminished, if the reflexes are equal.

Q. Now, if there is an injury to the nerve coming out between L-4 and L-5, would it be normal to find impairment in one or more of the reflexes?

A. Yes.

Q. Therefore, the normal reflexes would indicate no injury, is that correct?

A. No, sir; it is injury to the nerve, yes, sir.

Q. To the nerve. Doctor, what causes a backache, and your legs to hurt when the back is damaged?

[fol. 188] A. Well, you mean in a situation like this?

Q. I am talking about someone has an injury to their back, and as a result their lower back and one leg pains them. What caused that leg to pain, even though nothing hit it?

A. Well, that is usually a referred pain, due to nerve root irritation.

Q. In other words, the roots go from that lower part of the back down the leg?

A. Yes, sir.

Q. Is that not true?

A. Yes, sir.

Q. And the whole nerve is affected, and it affects the leg?

A. Certain segments of the nerve, at least, are affected.

Q. Now, Doctor, I will show you Defendant's Exhibit Number 6.

The Court: It is manifest the doctor will have to come back after lunch, so, I think we will recess for the lunch hour.

The Court Crier will recess Court until 1:30.

(Noon Recess.)

Afternoon Session, April 29, 1955, 1:30 P. M.

The Court: Are you ready to proceed?
Mr. Look: We are ready, Your Honor.

[fol. 189] The Court: Go ahead.

By Mr. Look:

Q. Dr. Thurman, I show you Defendant's Exhibit Number 6 and I show you Plaintiff's Exhibit Number 4, and I ask you if you see any substantial difference in between those two x-rays, Doctor?

A. No, sir. Other than the difference in densities from different—some alteration in technique, there is no difference; the anatomical arrangement is essentially the same.

Q. Now, Doctor, does this picture appear to have been taken from straight on her or at an angle?

A. I believe that just about has a straight, or AP view here both of them.

Mr. Alvis: Get the dates of those exhibits.

By Mr. Look:

Q. Now, this Plaintiff's Exhibit Number 6 is the '43 one, and this is Dr. Cash's 1954, is that correct?

A. Yes, sir.

Q. Now, then, I hand you Defendant's Exhibit Number 13. Now, Doctor, that is a picture made by you, one of the pictures made by you the other day, is it not?

A. Yes, sir.

Q. Doctor, do you find any substantial difference between this Defendant's Exhibit Number 6, made in 1943, and Defendant's Exhibit Number 13, made in 1955?

A. No, they are quite similar. The three main things that we mentioned previously, the narrowed space, the spina bifida and the anomalous transverse processes here.

Q. Now, Doctor, thank you, Doctor.

[fol. 190] Assuming that Mrs. Thomson, while a child, fell on a rail fence, astraddle it; assume further that some

time thereafter when a schoolgirl a chair was pulled out from under her as she was about to sit down and she struck her low back on the edge of the chair; and assuming further that since at least the time she was seventeen or eighteen years old she has continuously complained of intermittent back pain; what would your diagnosis on that basis be?

A. That this condition is of long standing.

Q. Well, Doctor, is the condition that you now find, is that or is that not a natural outgrowth of injuries such as I have outlined to you, as it progressed through the years?

A. Yes, it is felt those things are usually initiated in childhood and youth from accidental injuries, and progress as time goes on.

Mr. Look: Pass the witness.

Cross-examination.

By Mrs. Tarpley:

Q. Now, Dr. Thurman, is it possible to see a disk on the x-ray?

A. No, ma'am. They don't show up in the x-ray picture.

Q. I see. And it is the disks between the various vertebrae that keep the vertebrae separated, is that correct?

A. That is right, it is a cartilage cushion, you might say, between the various segments.

Q. What is the effect of a complete absence of one of these disks?

A. Well, the vertebral bodies come into apposition.

[fol. 191] Q. Does any pain result there from?

A. Yes.

Q. Pain does result from that?

A. Yes, ma'am.

Q. All right. Now, assuming that the disk is smaller, that it has degenerated, that it has been injured, or for some reason is less than its normal size, would there be any pain resulting?

A. Yes, ma'am.

Q. I see.

Would that pain increase as the disk degenerated or grew smaller?

A. Yes, ma'am, that is quite possible.

Q. Would the effect on the nervous system be greater as this disk was gradually removed?

A. Well, the effect on a specific nerve, the one making its exit from that particular opening in the spine would be increased.

Q. Now, Doctor, you have testified that two x-rays that were just shown to you, one made in 1943 and two then made in 1954, that you could see no difference between those two x-rays, is that correct?

A. That is right, in those views.

Q. Is it possible by those views to tell whether there is any portion of the disk remaining in either one of those two x-rays?

A. Well, the space is not completely collapsed, there is a narrowed space there, quite narrow, between L-4 and -5.

Q. In your opinion then would the portion of the disk, or a smaller disk still be present between those two vertebrae?

A. Yes, it could be, it probably is.

Q. And do you think there is no change in that space between 1943 and 1954?

[fol. 192] A. Not in those views that I just looked at, no.

Q. All right. Now, assuming that those were a normal process, and something that had occurred over a long period of time, would the disk gradually disappear?

A. No, it can be arrested at any point. It need not go to the point of complete collapse. That is a variable thing.

Q. I see. Now, Doctor, what effect would there be on the condition that you found in this spine from your x-rays of a sudden strain caused by pushing, or pulling, lifting, sudden strain to that portion of the back, what effect would it have on the back?

A. Well, it could—it could strain certain ligaments and produce swelling and initiate pain.

Q. Initiate pain?

A. It could.

Q. Now, Doctor, assuming that the patient had had, with a spine of the type seen in these x-rays, had had no diffi-

culty prior, or for some time prior to a given date, then on that particular date engaged in some straining, lifting, and suddenly felt pain and has continued to feel pain since then, what would your opinion be of that situation?

A. Well, it is quite possible.

Q. It is quite possible, you say?

A. Yes.

Q. And would a sudden strain of that type produce an aggravation or an increase of the difficulties seen in this back?

A. Yes, it certainly could.

Q. Could such an injury affect the condition to such an extent that a person prior to that strain could carry on a normal life and normal activity, and then immediately after that strain be incapacitated from lifting any heavy object or doing any type of work whatsoever?

[fol. 193] A. Possibly.

Q. It is possible, all right.

Now, I believe you said you conducted a physical examination of Mrs. Thomson, is that correct?

A. Yes.

Q. And did that physical examination include any leg raising tests or any tests for limitation of motion?

A. Yes, I put her through some bending tests.

Q. Did you find any limitation of motion?

A. No, not in any appreciable amount, but complaint of discomfort on—backward bending and lateral bending to the left.

Q. What determines limitation of motion so—in the medical sense, the inability to move, or the inability to move without pain?

A. The inability to—well, both.

Q. I see.

A. You can have ability to move, but the motion will be limited if it hurts.

Q. I believe you said that you also noted some arthritic changes in this back, is that correct?

A. Yes, indeed.

Q. Doctor, assuming a sudden injury, and then assuming x-rays are not taken for a period of two years, would the site of the injury bring or produce some arthritic changes?

A. In a period of two years?

Q. Yes, sir.

A. Possibly.

Q. Then, in other words, it is not possible for you to testify whether or not the arthritic changes you find in these x-rays made in 1954 have grown up in the last two years or the last ten years?

[fol. 194] A. No, it would be a chronic condition and it would be over a long period of time, and the exact time you could not determine.

Q. I see. It is impossible to distinguish arthritic changes, or to pinpoint them as to time, is that correct?

A. Well, that is right. It is an individual proposition and if course, chronic, you know it takes a good while for those changes to take place.

Q. In your opinion, Doctor, could a person, or could Mrs. Rubynelle Thomson do any type of heavy physical exertion in her present physical condition?

A. I would not advise heavy lifting, no.

Q. You would not?

A. No.

Q. Do you know of any treatment for her condition, Doctor Thurman?

A. Well, do you want me to outline what I would do if she were my patient?

Q. Yes, sir.

A. Well, I would probably put a proper fitting flexion type of brace on her.

Q. Yes, sir.

A. And then I would send her to a good physiotherapist, and having her instructed in Williams' exercises, to bring the torso into muscle balance, and she might go on indefinitely on conservative treatment.

Q. And if she did not respond to conservative treatment would there be any other kind of treatment?

A. If she did not respond to conservative treatment then she should be studied further with myelograms, which is the injection of opaque media into the spinal canal, and then surgery might have to be considered.

Q. What type of surgery would that be, Doctor? A spinal fusion?

A. Stabilization.

[fol. 195] Mrs. Tarpley: I think that is all, pass the witness.

Redirect examination.

By Mr. Look:

Q. Doctor, did you find any evidence of arthritis in any—throughout the back?

A. In the articular facets, those little joints between the fourth and fifth segments, I think there are some arthritic changes there due to overriding of those facts.

Mr. Look: Thank you, Doctor.

The defendant rests, Your Honor.

Mrs. Tarpley: Plaintiff closes, Your Honor.

Mr. Look: The defendant closes, Your Honor.

The Court: How much time would you feel necessary in order to sum up the case? Twenty minutes?

Mrs. Tarpley: I think that will be adequate, Your Honor.

Mr. Look: What was the time?

Mrs. Tarpley: Twenty minutes.

[fol. 196] Mr. Look: That would be adequate.

The Court: Let the argument proceed.

Mr. Look: Your Honor, we have our other motion to file.

Argument of Counsel for Plaintiff by Mrs. Tarpley

Mrs. Tarpley: Ladies and Gentlemen of the Jury:

I would imagine at this point you all are much tireder than we on this side of the rail. You all have been here for three weeks. You are drawing to the close of a very busy term and you have just one more decision to make before you are free of your duty and responsibility as citizens for another year.

It is only, however, because we have a system in our country that allows us to bring men and women of the community in to decide these disputes we are able to uphold our great judicial system.

I don't intend to take a great deal of time this afternoon to discuss the evidence with you. You have heard the evidence and probably remember it a great deal better than I do.

What I would like to do is go over with you for a few minutes some of the impressions I have gathered from listening to the evidence. The evidence that you have heard about the particular injury the morning of December 3, 1952.

The only direct evidence that you have heard about what happened on that particular morning came from [fol. 197] the plaintiff, Mrs. Rubynelle Thomson. The defendant brought in several witnesses who said they were there that morning. Apparently they all did as Jose Vasquez did, they checked the payroll records and then said they were there and they got paid for that day, so, they assume they were there.

But, not one person could tell you anything about the specific morning of December 3, 1952 except Mrs. Rubynelle Thomson.

All three of the witnesses, or four of the witnesses, Mr. Higginbotham, Sligh, the clerk, and Jose Vasquez, attempted to tell you about the custom that was followed out at Monahans at that particular time, but they could not all remember even the same thing about the custom.

Higginbotham said that it had always been the responsibility of the agent, and Jose Vasquez, the mail off this Number 2 and to take care of it. They, both of them, had always assisted on it, and that Vasquez was permanently assigned to assist in taking off this mail.

Slight couldn't remember anything about it.

The general clerk told you that as far as he could remember the agent always took the mail off all by himself, that he never had any kind of help.

Vasquez told you that up until a short time before this accident occurred he had taken off the mail and put the mail on all by himself, that he had been charged with that sole responsibility and that he had carried it out.

But, that suddenly there was a change in policy and the agent was instructed to assist him, or to take over the mail.

Now, Mrs. Thomson told you that two or three days before this accident occurred she had been specifically instructed by her superior, her immediate superior, Mr. Higginbotham, that she, and she alone, was to take care

of this mail. She had asked Mr. Higginbotham about [fol. 198] this new policy of the T&P to attempt to have their women employees to wear skirts and blouses, and he had told her it was her responsibility to take care of the mail, he did not care about that, he didn't know anything about that.

Mrs. Thomson told you she had been instructed by Higginbotham's superior, Lee Conroy, that as long as she could attend to her duties and take care of her duties he very much preferred she attempt to dress in a lady like manner.

Then, suddenly, although the mail had been handled for some time in a satisfactory manner, and without any reason, she is instructed that she herself is to handle that mail every day; that she herself is to pick up those fifty or seventy-five pound sacks and toss them on to the train, climb down off the baggage cart and shove it back into the station.

Ladies and Gentlemen, I submit to you that that was negligence. The T&P, in instructing and forcing her to carry out orders, to do a task that was beyond her physical strength. I submit to you that they failed in their responsibility to furnish her a safe place in which to work. That they failed to furnish her assistance that had always been there, that was there on the morning of this accident, and they have not shown one reason why they had insisted that she handle this mail alone.

The Court will tell you I am sure that it is the duty of an employer to furnish a safe place for an employee to work.

That there had been a safe place, there had been proper assistance, but all of a sudden that assistance stopped.

As I listened to this evidence I could not help but wonder if the situation was, as Higginbotham said, that Vasquez was supposed to take off that mail, why did the plaintiff [fol. 199] in this case, Mrs. Thomson, a woman of no unusual physical strength, why would she take it upon herself to climb up on that baggage cart and move those pouches of mail? Why would she pick up those fifteen or twenty bundles of magazines, unless she had been specifi-

cally instructed by her superior that that was her job and that she could not have any assistance?

Now, as to the results of this particular occurrence on that morning, Mrs. Thomson told you, and it has been shown by the testimony of Dr. Bell, that at the particular time of this accident she was suffering from a kidney infection; she was being treated for a kidney infection; and on two days after this assident occurred, when she passed out, they still thought it was because of the kidney infection.

It was not until approximately a month later, in the hospital at Big Spring, the T&P Hospital, when they had cured up this kidney infection and she was still suffering terrible pain that they got around to x-raying her and discovering this condition of her back.

Oh, but the defendant has brought doctors in here to you and they have said she had this condition since 1943. But, there is one thing that they have not been able to explain to you, that is, that in '43 when these x-rays were made, she was an employee of the Texas & Pacific Railway. She was doing the same type of work she was doing at the time she was injured, and she did not resign. I mean she was not fired.

When they took these x-rays in 1943 that they did not think she was disabled to perform the work of an agent-operator, and she resigned after her marriage. She bore three children normally and then when she applied for work with the T&P again in '51 they hired her. They had these x-rays in 1943, but they did not feel, they did not think she was disabled to perform her job, and she was not. [fol. 200] You have here in evidence the records of her earnings from 1951 to 1952. They show you that she worked as an agent and operator, she did the very work that she was performing at the time she was injured and she was able to do it. There were no complaints about her work.

Everything boils down to one morning the morning of December 3rd. Before that time she could perform any type of work she chose. Since that time she has not been able to work, or to work steadily at any job that required any kind of normal manual exertion.

Dr. Thurman, the defendant's own doctor that just left

this stand, and before he left he said, "No, I would not recommend she do any kind of heavy work with her back in that condition. I would not recommend that she do any kind of heavy lifting."

Yet, before December 3rd of 1952 she did that without any trouble. She carried out her duties without any trouble, until the negligence of the defendant, through its agent, Higginbotham, caused this injury.

Since that date she has not been in a position to work; she has not been in a position to work steadily.

Now, that is the evidence as it sounds to me.

I am sure the Court will tell you that if you find that this injury of December 3rd of 1952 was the aggravation of a pre-existing condition then it is your duty to determine how much of the disability resulted from that aggravation, and how much of the disability was present prior to that injury.

Just remember, before this injury she was doing her job; she has not been able to do it since.

Now, as to the amount of damages, you heard the testimony of the insurance man, Mr. Smith, who has had a great deal of experience in this type of thing. He told you it would cost fifty to sixty thousand dollars to purchase an endowment policy that would bring the income that [fol. 201] Mrs. Thomson was making at the time this injury occurred.

Over and above that, does it cost to be disabled to make living? What does it cost to be saddled with a bad back the rest of your life, to know you have three children to support with a bad back?

That is the evidence as it sounded to me.

Very shortly it will be in your hands.

I thank you all for your attention.

Argument of Counsel for Defendant by Mr. Look

Mr. Look: May it please the Court, Ladies, and Gentlemen:

My views of the evidence that has been presented here differ from Beverly's for several reasons.

Let's look at this objectively, and take Mrs. Thomson's own testimony. She was an operator on a railroad. She

herself testified that it was the duty of the operator, in most stations, to handle the mail and the baggage. That she knew that before she went to Monahans.

Now, what happened that very morning?

Jack Kittrell, Sligh, Vasquez and Higginbotham can't remember what happened that morning of December 3, 1952 because nothing unusual happened.

What is someone with whom you worked every day is injured on the job so terribly? Aren't they going to tell somebody about it? Mention it to them?

That is the natural thing to do. That was not done.

Dr. Thurman recommended that she not do heavy lifting. Nobody had ever said that they recommended that she ever do it.

R. J. Thomson, Jr. was on the stand and he said before they were ever married she had trouble with her back. She must have had trouble in '43, otherwise, why have an x-ray made of it? And the Texas & Pacific Railway Company did not make that x-ray. The Employees' Hospital, not the Railroad, made that x-ray.

[fol. 202] Now how about her condition today, and as it was back in 1943? It is the same.

Now, in what respect could the railroad possibly be negligent, for requiring an operator to do an operator's job?

Did Rubynelle Thomson ever ask anyone for any assistance in doing the job? Did she ever say it was too heavy for her?

She herself did not testify to that. She had done that same job in other places, exactly the same thing that she was doing there that day.

Now then she goes to Dr. Bell's hospital for treatment, her own choice, not a T&P Railway Company Association doctor or T&P Railway doctor, a good country doctor, and she goes to him to get cured. She had been going to him for kidney trouble. His nurses set down and make the entries, what she claims is wrong with her.

Don't you think there would have been some entries in there if she ever complained about hurting her back?

Would she go to a doctor to get cured if she had hurt her back that morning and not tell him about it?

She told him about the trouble she was having with her kidneys, she told the nurses about it, it is in evidence. Not one word anywhere in there about any back trouble.

You heard Dr. Hill testify about 1954 x-rays. Why were they taken? They were taken to show kidney trouble. They were taken by injecting a fluid into the veins to show the outline, the kidneys and bladder. They were treating Rubynelle Thomson for that.

Don't you suppose that if there had been any of this back pain, and radiating, and getting hurt, somebody there would have made an x-ray to show her back?

Why mess around with the kidneys and the bladder? [fol. 203] Rubynelle Thomson was doing the same job that she and hundreds of other operators were doing that same morning. Nothing unusual was mentioned. Nobody out there had the slightest idea of any injury until this lawsuit was filed, almost three years later, almost three years later. She worked after this.

We have a list in evidence of all the jobs that she had on the extra board. She worked as an operator until October, 1954. She has not worked since. Why? I don't know. She was working just like she had always been doing. We have a list of her earnings before, on one sheet. And remember that for two months she was gone, and then was reinstated later on. Was fired, and then was reinstated. She evidently felt able to work.

This is the statement she made back in 1953: "About November 4, 1952 I became ill with a kidney infection which made me very sick and caused my back, sides and stomach to be sore, particularly my left side. On December 3, 1952 I was handling baggage and newspapers off train Number Two at Monahans. I was feeling very badly."

She didn't tell anybody she was feeling badly. The T&P expected and had a right to expect her, if she was unable, physically unable to do a job, to at least tell somebody about it. She didn't tell a soul that she was feeling bad. She went and did her job just like she always did, all the way through. There was Vasquez there to help her. He said he was there, that he had been doing that job. He too was handling the mail that morning and every other morning.

She certainly would have told somebody, somebody would have seen it, somebody would have known about it. No one did.

She has got the same back today, and in the same shape that it was in in 1943, with the normal changes that [fol. 204] would be expected with age. That is what the doctors testified.

Dr. Cash said she had a bad back. They did not recall Dr. Cash to ask him if there was any difference in that back, the doctor that had examined this woman, as his own testimony, for the lawyers of the plaintiff. He was not recalled to testify, to say if there was any change. He did not testify that this one thing caused it.

What history did she give him? Did she give him a history of the back? No.

All she told him was one thing, and he did find some abnormality in the back, which every doctor has found which looked at it, and rightly so. But, she had that back long before December 3, 1952.

ARGUMENT FOR DEFENDANT BY MR. ALVIS

Mr. Alvis: If it please the Court, Gentlemen of the Jury: I am not going to make any great harangue in this case. This is a case of a woman suing the Texas & Pacific Railway Company, and I want to discuss with you just briefly just exactly what occurred here, in my summation of the evidence in this case.

This young lady had worked for the railroad back in 1943 and then she got married and laid off. And then many years later she went back to the Texas & Pacific Railway Company and applied for a job. They gave her a job on what they call the extra board, and then the job opened up out at Monahans, Texas, the third trick operator's job at Monahans, Texas.

This young lady right here knew exactly what the duties were of the third trick operator out at Monahans, Texas, and knowing exactly what would be required of her as an operator and as an employee at Monahans, Texas made an [fol. 205] application and made a bid for the job and she got the job.

She tells you in her own words that she knew exactly

what she was going to have to do. She knew that she was going to have to handle the mail and the baggage there they were required to do on that particular shift. Now, she tells you that.

All right, she gets that job and goes out there and goes to work and then she tells you that Mr. Lee Conroy, I believe his name was, Assistant Superintendent from Big Springs, came along, and she asked him, now, handling these mails have I got to wear—can I wear a dress, a skirt and hose, or should I wear britches?

And what did she say this gentleman told her? This gentleman told her, this is her testimony now, from the record here, she said Mr. Lee Conroy told me it would be all right for me to wear a dress if I wanted to, so long as I got the job done and did not delay the trains. Now, that is exactly what happened.

Mr. Lee Conroy did not tell her that she was relieved of any duties of handling the mail and the baggage and other things that were necessary on that particular one train that was on her shift, the only train that she had to work, according to the testimony in this case was train Number Two that made up at El Paso and came through there in the early morning at about 7:20 o'clock in the morning. And that was her job to do that, and she knew that.

She tells you herself that when she hired out for that job that they told her that that is your job, you are drawing the same pay as a man, you know what the job entails, and that is what she hired out to do.

All right, now, let's go a little farther on this. She claims she got hurt out there. She is the only one that knows anything about that. Nobody else knows anything [fol. 206] about her being hurt out there at all, and it is questionable in my mind whether she was actually hurt at all, or not.

But now, let's see what happened since that time? Since the date of her alleged injury she has continued to work for the Texas & Pacific Railway Company on the extra board. She has taken those jobs every time they were open, and she worked. And here, Gentlemen, Ladies and Gentlemen of the Jury, is another very significant thing

that this young lady right here told us right here in this Courtroom. She says since that time I bid in the station out at Kent, Texas. You gentlemen will remember she testified that, and she says, "I got the job." And she says, "Out at Kent, Texas we don't have to handle any mail at all. Kent is just a small place where they don't transfer mail and things there." And she had that job at the same pay, with her seniority rights.

She tells you she was able to do the job, but the reason she could not—did not take it was because Kent was a small place and she just couldn't find a suitable place to stay.

Now, Gentlemen, there are the facts in this particular case. The lady is able to work right now. She is able to make as much money as she was making at the time of her alleged injury, or before that time. She tells you, Gentlemen, that, in her own words.

Oh, they come in here and talk about the poor woman working here for a big corporation and they bring Joe Smith in here, an insurance man, to put up some fantastic kind of a story about how much money it would take to invest and earn three hundred dollars per month. I thought I understood Joe to say, you have got to take that money and invest it at a certain percentage to make that return. [fol. 207] Now, Joe, at the end of the term, wouldn't you still have your money invested?

He said, "No, I am talking about a policy with my company."

Joe didn't tell you gentlemen of the jury how much of that cost was paid to the local agent, either. He didn't tell you how much of that money came out of there for the ownership and operation and profits for the insurance company. That is just a big smoke screen they brought in here to try to make some big figures, and that is all in the world it was for.

Now, Gentlemen, I think the Court will instruct you gentlemen that unless you find the Texas & Pacific Railway Company guilty of negligence, and that that negligence was a direct and proximate cause of this woman's injury, that you will return a verdict for the defendant. I think the Court will instruct you that.

Now, where is the negligence on the part of the railroad people?

Now, Beverly talks about a safe place to work. Was there anything wrong with it? Was there anything wrong with the station platform? Was there anything wrong with any of the carts or trucks we used there? Was there anything wrong with anything about there?

According to her own testimony and the testimony of the other witnesses there isn't a thing in the world wrong there. So, what do you mean, not a safe place to work?

It is just as safe a place to work in as there was anywhere else, and there wasn't any defects or anything, and they have not shown any.

Now, another thing, you get down to talking about damages and things of that kind, oh, it is easy to get up here and try to talk about a poor old woman out here working, lost her job, and all that kind of stuff, the big damages and [fol. 208] that sort of thing. But, let's settle down and see what the actual facts were?

If she was hurt what is her diminished earning capacity? She bid in a job out there that she can do, she tells you that. She would make the same identical money she was making at the time of this accident.

All right then, they come in here with these x-ray pictures that were made by Dr. Cash. Now, those x-ray pictures, Doctor, oh, boy, we really have got something here. Well, we went to work to see if we couldn't find out something because if she had received an injury that caused the back, like she said out there, all of the employees out there would have known about it, but none of them knew about it. So, we started digging into this young lady's history and we found where she had been in the hospital over in Marshall back yonder in 1943, and there were the pictures in there with the same back, and in the same condition then as it is now, and then she comes in here and asks this jury to give her money for the condition of her back that was there ten years prior to the time of her alleged injury.

Gentlemen, I am not going to take any more of your time. I do wish to thank you for your attention to the case. I know you want to do what is right about it. I

know that you want to be as fair to one side as you are to the other. I may be a little biased here in representing my client. I don't think I am. I think I have reached the age where, if a person has received a valid injury, I think I can say that the man is entitled to something. I think I am a pretty good judge of what he ought to be paid. But, in this particular case, Ladies and Gentlemen, I don't think the young lady received any injury on December 3, 1952 at all and I don't think she is entitled to one single, solitary penny.

Now, that is just the way I feel about it.

[fol. 209] Now, Gentlemen, again, I want to thank you very much.

Rebuttal Argument by Counsel for Plaintiff, Mrs. Tarpley

Mrs. Tarpley: May it please the Court.

Lawyers are all alike in one respect. We all three got up here and told you we were not going to go back over the evidence, and all three got up here and did it.

I would like to frankly admit I am going to go back one more time, and ask you to bear with me for a few more minutes.

They point out Mrs. Thomson at the time she bid in on that Monahans job knew exactly what the duties were and exactly what the job entailed. That is right.

What she knew is what the custom and what the situation had been out there for the last several years with reference to the duty of the operator and the agent.

Jose Vasquez told you what that duty was. He told you it did not involve handling the mail, because he himself had handled it for all the time he had been working that particular shift. He testified that it was not until some time after Mrs. Thomson came out there as agent and operator that suddenly the operator began to be interested in actually moving that mail. Mrs. Thomson told you that was only two or three days before this accident happened.

She knew what she was asking for when she went to Monahans, but once there she found her duties were suddenly increased; increased on the orders of her direct superior, after a Mr. Lee Conroy had told her she did not

have to perform those duties. All of a sudden they were increased and she had to lift fifty and seventy-five pound sacks of mail and move them.

[fol. 210] Then they go on to say that all the people that were there that morning they didn't know anything about this injury that she had. Nobody on the T&P knew a thing about this injury until this suit was filed. Then they offer as proof of that this statement Mrs. Thomson made on January 29, 1953, just a little over a month after this accident occurred. She tells you just as she told you on this witness stand, in that statement, she was suffering from the kidney infection. She went down there and went to work. She felt this sudden pain. She had only thirty minutes more to work and she went home and went to bed. Two days later she was in the hospital, she had been suffering from a kidney infection, or, that is what they treated her for. Then she got out of the hospital in Monahans and was sent to Big Spring and entered the hospital there.

She was in the hospital at Big Spring until some time in later January, and on January 29, 1953, she wrote a statement at the company's request, to a company supervisor, Mr. Wright, and said, "I had this kidney infection, but that is all gone and my back still hurts, and I know now that I injured by back on December 3, 1953."

The defendant has spared no trouble or time to bring in doctors to testify to Mrs. Thomson's condition. When they called the roll they left one of them out. They did not bring——

Mr. Look: Your Honor——

Mrs. Tarpley: They did not bring down here to you a doctor who treated Mrs. Thomson immediately after this injury occurred. She spent two or three or possibly more weeks. She said she was in the hospital off and on from the [fol. 211] latter part of December until March of '53, but they did not bring you the doctor who treated her then.

Mr. Look: Excuse me, Beverly.

Your Honor, we object to any reference as to not bringing any doctors, unless it is shown that any other doctors were then and are now under the control and supervision of the Texas & Pacific Railway Company.

Mrs. Tarpley: If the Court please, we submit this is fair.

The Court: I think the jury will recollect the testimony on that point. I don't know that there is any doctor they admitted he was under the control of the railroad company.

Mr. Look: No, Your Honor, the portion I am objecting to is the argument in which she says why the railroad did not bring some other doctor down, and there is no evidence that there is any other doctor that is under control.

The Court: The point I am thinking of, Counsel, you are raising the point, asking the Court to rule on something that is really within the province of the jury, it is a question of fact rather than law, and they recollect those things.

Mr. Look: Your Honor, would you note our exception? [fol. 212] The Court: All right.

Mrs. Tarpley: They brought down here a doctor from Marshall, the Chief Surgeon. Dr. Hill told you that he had not seen her since 1943 when he made these first x-rays.

They brought down here Dr. Bell, who never made any x-rays of her, and who treated her for kidney ailment, and for that alone.

And they brought a Dr. George Thurman, a local doctor who saw her once, examined her once for the purpose of testifying on this witness stand.

That is the medical evidence that they have brought to you, and the one fact that they have never been able to dispute is that before this accident occurred she was able to do her job. Since this accident occurred, by their own doctor's testimony, the testimony of Dr. Thurman, she can't do any lifting. She can't do what would be required of her to work as an agent.

But they say she can qualify as an agent out at Trent—out in Kent. You heard Mrs. Thomson say she did not have a car and it was too far from a doctor for her to feel she could actually take that position.

She never worried about being close to a doctor before this accident occurred, but it has been something that has been with her constantly ever since.

They have never been able to satisfactorily explain that sudden change between the ability to do something and not [fol. 213] being able to do it, except that Dr. Thurman reluctantly admitted, yes, if a person got out and lifted some

heavy bundles and then tried to push a cart, cause a strain on this low back area, certainly, that could have resulted in her being disabled to perform the work she had been doing before, and it could be a sudden change.

That is exactly what this plaintiff has contended throughout this trial. That is exactly the one fact that they have never been able to refute, what she was able to do before and what she is not able to do now.

Now, so far as the damages are concerned, I don't even pretend to try to suggest to a jury what your decision ought to be. As I said before, I don't know how to put into dollars and cents a back in the condition that Mrs. Thomson's is in now. I don't know how to put into dollars and cents, not being able to hold down the work at the only thing you have ever done. That is up to you ladies and gentlemen and I am very glad that it is.

But, Mr. Alvis talks a great deal about the profits of an insurance company and how much a local agent makes. I don't know what all that has to do with this lawsuit, but you heard the testimony of Mr. Smith who has been in the insurance business for a good many years, most of it here in Abilene, who told you what it would cost to buy an endowment policy which would pay three hundred dollars a month, which was what she was making before this accident occurred.

I don't know what it would cost, so far as just investing cash money and getting a return on your investment. But, my guess would be it would be a good deal more than that. [fol. 214] Now, Ladies and Gentlemen, the matter is in your hands. I think both sides will agree you have been very attentive and I think both sides appreciate that a great deal.

All either side is asking for is your fair consideration of the evidence and your decision of the issue that the Judge will give you on the basis of that evidence.

Thank you very much.

Court's Charge

Gentlemen of the Jury, the suit on trial is one in the nature of an action for damages for personal injuries alleged to have been sustained by the plaintiff while in the employ of the defendant.

The plaintiff alleges that she was on or about the 3rd of December, 1952, employed by the defendant as an agent at Monahans, Texas, that her duties included among other things meeting the train upon its arrival at the station and to receive and look after the incoming mail, that on said date she observed unusually large quantities of mail, approaching the Christmas season. She asked her superiors for help to unload the heavy mail, which was refused her although assistance was then available, that she was then ordered to unload the mail which she attempted to do and because of its quan-ity and weight in lifting and handling the same she sustained serious and painful injuries which were occasioned by the failure of the defendant to furnish a safe place to work and in requiring the plaintiff to perfrom heavy, strenuous duties beyond her physical strength and in failing to furnish her assistance to handle the heavy [fol. 215] pieces of mail when there were people about and present that might assist, that such negligence was the proximate cause of her injuries, that she suffered pain in her back which she at first thought was a strain, but that she has as a result of such injury continued to suffer severe pain in her lower back and abdomen and has extreme nervousness, there is limitation of the motion in the dorsal and lumbar regions of the back present in bending and stooping, with muscle tenderness in the region, that there is an injury to the disc between the ninth and tenth dorsal vertebrae and other injuries to the vertebrae in connection with said disc and in the region of the fourth lumbar vertebra, which is all more fully set out in her pleading which has been presented to you, which she alleges to be the direct and proximate result of the defendant's negligence in failing to give her the assistance desired and necessary. She further alleges that prior to her injury she was a strong, healthy woman and was capable of earning and did earn a salary in the amount of $1.83 an hour, that since such injury she has not been able to do and perform labor as before, that her injuries are permanent. She sues for damages in the amount of $50,000.00.

The defendant denies that plaintiff was injured as alleged in her pleading and charges that such disability, if any, that she has sustained is a direct result of pre-exist-

ing disease or congenital defects in no manner connected with her employment by the defendant. Defendant further charges that her injuries, if any, were solely caused by various and numerous acts and omissions on her part. Defendant further charges that if any injuries she sustained they were caused by negligent acts and omissions on behalf of the plaintiff herself, each of which negligent acts and omissions contributed to the plaintiff's injury. Defendant denies that the injury, if any, was caused by any [fol. 216] negligence of the servants or employees of the defendant.

This jury is instructed that it appears without dispute that at the time of the alleged accident both plaintiff and defendant were engaged in interstate commerce, and, therefore, the rights and liabil-ties of the parties to this lawsuit will be governed and controlled solely by an Act of Congress known as the Federal Employers' Liability Act. The rights and liabilities of the parties to this lawsuit are not governed, affected or controlled by the laws of Texas, but solely by the Federal Employers' Liability Act.

The jury is instructed that the Federal Employers' Liability Act provides as follows:

"Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carriers * * *".

The burden of proof is upon the plaintiff to establish her right of recovery by a preponderance of the evidence.

By the term "burden of proof" as used in the charge is meant the greater weight and degree of credible evidence. Unless the plaintiff so establishes her case by such preponderance of the evidence, she cannot recover.

By the "preponderance of the evidence", you are told, that it does not mean the greater number of witnesses testifying on either side of the case, but that it does mean the greater weight that should be given to the testimony

in the light of attending circumstances tending to establish the facts or truth of the case.

By the term "negligence" is meant a failure to use ordinary care which is the doing of that which an ordinarily [fol. 217] prudent person would not have done under the same or similar circumstances.

By the term "proximate cause" as used in this charge is meant the moving and efficient cause, unbroken by any new and independent cause, without which the injury in question would not have happened. An act or omission becomes the proximate cause of any injury whenever such injury is the natural and probable consequence of the act or omission in question, and one that ought to have been reasonably foreseen by a person of ordinary care and prudence in the light of the attending circumstances.

The term "sole proximate cause" as used in the charge means that such cause was the only cause of what happened and in the absence of which the event would not have occurred.

By "contributory negligence" is meant such an act, or failure to act, if any, on the part of the plaintiff, as would amount to a want of ordinary care and prudence for her own protection, and which negligence or contributory negligence concurring with any negligent act or omission on the part of the defendant, its agents and servants, might become together and concurring together the proximate cause of the injuries sustained by the plaintiff.

Unless you find and believe from a preponderance of the evidence that the plaintiff has established her case as alleged in her complaint, which was read to you, you will find for the defendant. Applying to the facts further, however, and on the other hand, if you believe and find from a preponderance of the evidence that the defendant was negligent in any of the particulars alleged, and that such negligence in whole or in part was the proximate cause of the alleged injuries of plaintiff, then it becomes your duty to find a verdict for the plaintiff.

[fol. 218] The jury is instructed that the burden to prove by the greater weight or preponderance of the evidence that the defendant was guilty of negligence which, in whole or in part, was the proximate cause of the accident and her resulting injury is upon the p-aintiff. By the term

burden of proof is meant the greater weight of credible testimony.

The jury is instructed that the burden of proof to establish by the greater weight or preponderance of the evidence that the plaintiff was guilty of contributory negligence is upon the defendant.

If you find for the plaintiff in this case, you will assess and award her such damages as she has sustained as a proximate result, in whole or in part, of the negligence, if any, of the defendant.

In determining the amount of damages, if any, which you find from the evidence that plaintiff is entitled to receive, you will take into consideration her age, her past and future capacity, if any, to work and earn money, the character, nature, extent and severity of her injuries, if any, and the extent to which she has been incapacitated to work and earn money in the future as a consequence of such injuries; and in determining the present cash value of plaintiff's future damages, if any, by reason of future physical pain and suffering and future lost and diminished earnings or capacity to earn, you will first ascertain plaintiff's total future damages, if any, for lost or diminished earnings and future suffering for a period beyond this date equal to her life expectancy as you may believe from the evidence, and you will then reduce such sum of money for such future damages, if any, to its present cash value by discounting the total of such future sum at the highest net rate of interest as may be shown by the evidence that can be obtained from money safely and securely invested by a reasonably prudent and ordinarily careful person.

[fol. 219] If you find and believe from the evidence that the plaintiff was negligent, as alleged by the defendant, and that such negligence on the plaintiff's part was the sole proximate cause of her injuries and damages, if any, then you are instructed that your verdict must be for the defendant and against the plaintiff.

On the other hand, if you find and believe from the evidence that plaintiff was also negligent and that such negligence was not the sole proximate cause of the alleged injury, but that plaintiff's negligence was only a partial cause of said injury and that the negligence of the plaintiff

concurred with the negligence of the defendant to produce plaintiff's alleged injuries, if any, then you are instructed that the Federal Employers' Liability Act provides as follows:

"In all actions hereinafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee * * * the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

You are the exclusive judges of the weight to be given to the testimony and of the credibility of the witnesses. It is the province of the jury in the trial of a lawsuit to weigh the evidence and find and determine the truth and so report it in their verdict under the charge of the Court. It is the duty of the Court to instruct the jury as to the law, which is given you in this written charge.

The form of your verdict will be in writing and will be signed by one of your number as foreman. The Clerk usually supplies some blank forms which you may use, or else you may write your verdict in its entirety.

[fol. 220] Summing up the evidence in the light of your verdict which you are now to render, if you find that the defendant and none of its agents were negligent in connection with the alleged injury of plaintiff, then your verdict will be for the defendant. If you find that the plaintiff's injury, if any, was due solely to her negligence, then your verdict will be for the defendant.

On the other hand, if you find that the plaintiff was injured as alleged in her pleading and that the same was solely due to the negligence of the defendant, its agents and servants, then you will find for the plaintiff without any reduction. If, however, you find that although plaintiff was injured, she was guilty of contributory negligence which in part contributed to her injuries along with other negligence committed by the defendant's agents and servants, then you will reduce her verdict in proportion to the amount of negligence attributable to her.

In considering the verdict, you are advised by the Court

that no portion of the judgment, if any, which may be awarded to the plaintiff will be subject to income tax.

Testimony has been received as to the expectancy of life of the plaintiff according to certain mortality tables. These tables are not binding or conclusive upon you, but this testimony has been received as an aid to the jury and you will give it such weight as you believe it entitled to in the light of your common sense and experience in the affairs of life. The plaintiff may live beyond her expectancy or, on the other hand, she may die before her expectancy, and you will consider this evidence in connection with all of the facts and circumstances of the case.

I give you one charge requested by the defendant:

You are charged that in arriving at your findings of damages, if any, you may take into consideration only such damages that resulted solely from the plaintiff's injuries sustained on December 3, 1952, if she did sustain any, and you may not take into consideration any disabilities, in-

[fol. 221] juries or incapacities, if any, resulting from or due to any prior injuries, diseases, or congenital abnormalities, existing before the date of the alleged injury.

You will retire and consider of your verdict and if we decide to give you any further charge we will send for you.

(Jury retired from the Courtroom.)

The Court: Any exception from plaintiff?

Mrs. Tarpley: No, none from the plaintiff.

Mr. Look: None, Your Honor, subject of course, to our motion for peremptory instruction.

The Court: Yes, I have marked those refused and they become a part of the record.

Mr. Look: Yes, sir. And I believe we have another requested instruction, did we not, sir? Did you refuse it?

The Court: Yes, I have refused the motion and any requested instructions.

Mr. Look: Thank you, Your Honor.

The Court: Except the one that was read.

[fol. 222] Mr. Alvis: In other words, we may have our exception then on it?

The Court: Yes, those that are refused, and the charge, is a part of the record, I think protects you as fully as all the bills you could bring.

Mr. Alvis: Thank you.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

[File endorsement omitted.]

Motion for Peremptory Instruction by Defendant for Directed Verdict at Close of Plaintiff's Case and Ruling Thereon—April 28, 1955

Comes Now the Texas and Pacific Railway Company, Defendant, in the above styled and numbered cause and when the Plaintiff has rested and before the Defendant has presented any evidence respectfully moves the Court to peremptorily instruct the jury as follows:

[fol. 223] "Ladies and Gentlemen of the Jury:

"You are instructed that the law and the facts are with the Defendant in this case, and you will return a verdict for the Defendant."

——— ———, Foreman of the Jury.

As grounds for the above instruction, the Defendant would respectfully show the Court as follows:

I

The undisputed evidence in this cause shows that the Plaintiff at the time and place in question was merely required to perform the work that she had been doing for several months before this occasion. She was doing the same character of work that other employees constantly and generally did. She cannot complain if the Texas and Pacific Railway Company merely required her to do the usual and customary work required of persons in this line of employment or, stated in another way, required by the character of business in which she was employed.

II

The undisputed evidence shows that the mail upon the train in question was handled by employees of the United States Government and not by employees of this Defend-

ant; that the Plaintiff did not ask for any help or aid in unloading the mail at the time and place in question and the Plaintiff voluntarily proceeded to do the work without assistance and without seeking or asking for assistance.

[fol. 224] III

The Defendant could not have reasonably foreseen the resultant injuries, if any.

Wherefore, Premises Considered, Defendant herein prays that the Court peremptorily instruct the jury as above set forth.

Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr.,
(J. B. Look, Jr.)

P. O. Box 360, Abilene, Texas.

Refused 4-28-55.

T. Whitfield Davidson, Judge.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Motion for Peremptory Instruction by Defendant for Directed Verdict at Close of Case and Ruling Thereon —April 28, 1955

Comes Now the Texas and Pacific Railway Company, Defendant in the above styled and numbered cause, and [fol. 225] at the close of the evidence and before argument of counsel and before the charge to the jury the Defendant respectfully moves the Court to peremptorily instruct the jury as follows:

"Ladies and Gentlemen of the Jury:

"You are instructed that the law and the facts are with the Defendant in this case, and you will return a verdict for the Defendant."

—— ——, Foreman of the Jury.

As grounds for the above instruction, the Defendant would respectfully show the Court as follows:

I

The undisputed evidence in this cause shows that the Plaintiff at the time and place in question was merely required to perform the work that she had been doing for several months before this occasion. She was doing the same character of work that other employees constantly and generally did. She cannot complain if the Texas and Pacific Railway Company merely required her to do the usual and customary work required of persons in this line of employment or, stated in another way, required by the character of business in which she was employed.

IA

There is no evidence that the Defendant was guilty of any negligence in this case, now that the negligence, if any, was a proximate cause of Plaintiff's injuries or damages, if any.

[fol. 226]

II

The undisputed evidence shows that the mail upon the train in question was handled by employees of the United States Government and not by the employees of this Defendant; that the Plaintiff did not ask for any help or aid in unloading the mail at the time and place in question and the Plaintiff voluntarily proceeded to do the work without assistance and without seeking or asking for assistance.

III

The Defendant could not have reasonably foreseen the resultant injuries, if any.

Wherefore, Premises Considered, Defendant herein prays that the Court peremptorily instruct the jury as above set forth.

Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr.,
(J. B. Look, Jr.)

P. O. Box 360, Abilene, Texas.

Motion denied 4-28-55.

T. Whitfield Davidson, Judge.

[fol. 227] In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Defendant's Requested Special Charge No. I and Ruling Thereon—April 28, 1955

Now comes the Defendant and before the Court has submitted the charge to the jury and without in any manner waiving its request for peremptory instruction and requests the Court to submit the following special charge to the jury or to prepare and submit to the jury a charge properly submitting the matters therein suggested.

"Ladies and Gentlemen of the Jury:

"You are charged that the mere occurrence of an accident or injury is not any evidence of negligence on the behalf of any person."

Respectfully requested, Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr., (J. B. Look, Jr.)

P. O. Box 360, Abilene, Texas.

Refused: —

[fol. 228] Submitted in time and manner required by law and after a copy of same has been submitted to Plaintiff's counsel and to which action of the Court in refusing to submit the requested charge to the jury the Defendant excepts.

T. Whitfield Davidson, Judge Presiding.

In United States District Court for the Northern Judicial District of Texas, Abilene Division

Verdict—April 28, 1955

Verdict of the Jury in the case of Ruby Nell Thomson, vs. Texas & Pacific Railway Company No. 1322 Civil.

We, the Jury, find for the plaintiff and assess her damages at $5,700.00.

(S.) J. L. Collett, Foreman.

In United States District Court for the Northern District of Texas, Abilene Division

No. 1322—Civil

Ruby Nell Thomson, a Widow, Plaintiff, and R. J. Thomson, Involuntary Plaintiff,

vs.

T. & P. Railway Company, Defendant

Judgment—May 7, 1955

On This 27th day of April 1955 came on to be heard the above styled and numbered cause and came the plaintiff in person and by attorney and the involuntary plaintiff [fol. 229] appeared in person and came the T. & P Railroad Company by attorney and all parties announced ready for trial. Whereupon a jury consisting of J. L. Collett as foreman and eleven other good and lawful jurors was duly impaneled, and the Court proceeded to hear the pleadings, evidence and arguments of counsel. Whereupon said case was submitted to the jury under charge of the Court and the jury returned the following verdict:

We, the jury, find for the plaintiff and assess her damages at Five Thousand Seven Hundred and No/100 ($5,700.00) Dollars.

(S.) J. L. Collett, Foreman of the Jury.

and Court having received said verdict and having ascertained that it was the verdict of all members of the jury is of the opinion that the plaintiff is entitled to recover judgment thereon. The Court further finds that the involuntary plaintiff, R. J. Thomson, Jr., appear in open Court and under oath disclaim any and all interest which he might have in and to this cause of action and resulting verdict, and further file a written disclaimer among the papers of this case. The Court finds that the plaintiff, Ruby Nell Thomson, has received proceeds in the amount of One Hundred Eighty-two and No/100 ($182.00) Dollars from the Railroad Retirement Fund and that the said fund is entitled to re-imbursement in that amount out of the proceeds of this judgment.

It Is Therefore Ordered, Adjudged And Received that the plaintiff, Ruby Nell Thomson, do have and recover of and from the defendant, T. & P. Railway Company, [fol. 230] the sum of Five Thousand Seven Hundred and No/100 ($5,700.00) Dollars. Said defendant is hereby ordered to pay the sum of One Hundred Eighty-two and No/100 ($182.00) Dollars directly to the Railroad Retirement Fund in satisfaction of its subrogation claim herein and to pay the balance of said sum of Five Thousand Seven Hundred and No/100 ($5,700.00) Dollars to-wit: Five Thousand Five Hundred Eighteen and No/100 ($5,518.00) Dollars to the plaintiff, Ruby Nell Thomson. All costs in this behalf expended are hereby taxed against the defendant for all of which let execution issue to all of which action the defendant in open Court expected and gave notice of appeal to the Court of Appeals for the Fifth Circuit.

Entered this 5 day of May, 1955.

(S.) T. Whitfield Davidson, United States District Judge.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Alternative Motion for Judgment Notwithstanding the Verdict or for New Trial—Filed May 7, 1955

Comes Now the Defendant and respectfully moves the Court to set aside the verdict entered in the above cause [fol. 231] on the 28th day of April, 1955, and the judgment entered therein, and that judgment be entered therein in favor of Defendant in accordance with the motion for directed verdict made by the Defendant at the close of all the testimony herein on the following grounds as stated in that motion:

I

The undisputed evidence in this cause shows that the Plaintiff at the time and place in question was merely required to perform the work that she had been doing for several months before this occasion. She was doing the

same character work that other employees constantly and generally did. She cannot complain if the Texas and Pacific Railway Company merely required her to do the usual and customary work required of persons in this line of employment or, stated in another way, required by the character of business in which she was employed.

II

There is no evidence that the Defendant was guilty of any negligence in this case, nor that the negligence, if any, was a proximate cause of Plaintiff's injuries or damages, if any.

III

The undisputed evidence shows that the mail upon the train in question was handled by employees of the United States Government and not by the employees of this Defendant; that the Plaintiff did not ask for any help or aid in unloading the mail at the time and place in question [fol. 232] and the Plaintiff voluntarily proceeded to do the work without assistance and without seeking or asking for assistance.

IV

The Defendant could not have reasonably foreseen the resultant injuries, if any.

In the alternative this Defendant respectfully moves the Court to set aside the verdict and grant Defendant a new trial on the following grounds:

V

The verdict is contrary to the law.

VI

The verdict is contrary to the evidence.

VII

The evidence in this case is totally insufficient to show any liability on the part of the Defendant and there is no evidence to sustain the verdict of the Jury herein.

VIII

The evidence considered in the most favorable light on behalf of Plaintiff is insufficient to support any verdict that might be rendered for the Plaintiff against the Defendant herein.

[fol. 233]

IX

The evidence viewed in the light most favorable to the Plaintiff shows that the Plaintiff, at the time and place in question, was doing her regular assigned job, such as had been done by her many times before and such as was done by all operators upon the railroad; that she did not request any aid in the job and that while doing such routine job, she suffered an injury.

X

There is no evidence to support the Plaintiff's allegation that she requested her immediate superior for help and that he refused same and ordered her to do the job without help. There is no evidence that the place at which the Plaintiff was working was not a safe place to work; there is no evidence that the Defendant knew or should have known that any of the duties were beyond her physical strength and there was no evidence that Plaintiff ever requested assistance on account of the work being heavy and/or strenuous which are the acts complained of by the Plaintiff.

XI

Counsel for Plaintiff conducted herself improperly in arguing to the Jury and commenting upon the fact that the physician who had treated the Plaintiff in Big Spring, Texas, was not called as a witness by the Defendant when it was nowhere shown in the record or in the testimony or otherwise that said physician was under the direction and control of the Defendant or was even within the jurisdiction of the Court and the Court erred in not admonishing Counsel or instructing the Jury to disregard such state-

[fol. 234] ments when objected thereto upon the above listed grounds by Defendant's Counsel.

XII

For each of the grounds listed above in the portion of this alternative motion requesting a judgment notwithstanding the verdict.

This motion is based upon the records and procedures of this action and Defendant respectfully prays the Court to set aside the verdict and judgment thereon heretofore rendered in this cause and to enter judgment for Defendant and in the alternative to set aside the verdict and judgment entered thereon in this cause and grant Defendant a new trial.

Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr., Attorneys for Defendant.

P. O. Box 360, Abilene, Texas.

[fol. 235] In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Order Overruling Motion for Judgment Notwithstanding the Verdict or for New Trial—May 14, 1955

On This 13 day of May 1955, came on to be heard the motion of the defendant, Texas & Pacific Railway Company, for judgment notwithstanding the verdict or in the alternative for a new trial; and the Court after considering said motion is of the opinion that it should be denied.

It Is Therefore Ordered that the motion of the defendant, Texas & Pacific Railway Company, for judgment notwithstanding the verdict or in the alternative for a new trial be, and it is hereby, in all things overruled and denied to which action of the Court, the defendant excepted and gave notice of appeal to the Court of Appeals for the Fifth Circuit sitting in New Orleans.

(S.) T. Whitfield Davidson, United States District Judge.

[fol. 236] In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Notice of Appeal—Filed June 9, 1955

Notice is hereby given that the Texas & Pacific Railway Company, a corporation, defendant above named hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment and the order overruling defendant's motion for judgment non obstante veredicto and in the alternative for a new trial, entered in this action on the 13th day of May, 1955.

Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr., (J. B. Look, Jr.), Attorneys for Appellant.

P. O. Box 360, Abilene, Texas.

A true and correct copy of the above has this the 9th day of May been furnished to Scarborough, Yates, Scarborough & Black, Attorneys for Plaintiff.

[fols. 237-238] Supersedeas Bond on Appeal for $6,000 approved and filed June 14, 1955 omitted in printing.

[fol. 239] In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Motion to Extend Time for Filing and Docketing of Record and Order Thereon

Comes now the Texas & Pacific Railway Company, a corporation, and moves the Court to extend the time for filing the record and docketing the appeal until the 15th day of August, 1955, and as grounds therefor would show the Court as follows:

(1) Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed herein by the Defendant on the 9th day of June 1955.

(2) Defendant has been unable to file his designation of record on appeal for the reason that the stenographic transcript of evidence and proceedings has not yet been completed by the Court Reporter.

[fol. 240] (3) That the Clerk will be unable to complete and prepare the record on appeal herein within the period of forty (40) days from the date of filing of such notice of appeal for the reason that Defendant cannot file its designation of record on appeal until the completion of the stenographic transcript of the record by the Court Reporter.

Wherefore, Defendant moves the Court for an order extending the time within which the record on appeal may be filed and the appeal docketed in said Court of Appeals to and including the 15th day of August 1955.

Wagstaff, Harwell, Alvis & Pope, (S.) By J. B. Look, Jr., (J. B. Look, Jr.), Attorneys for Plaintiff.

P. O. Box 360,

Abilene, Texas.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Motion to Extend Time for Filing and Docketing of Records—Filed June 29, 1955

On this the 27 day of June, 1955, came on to be heard Defendant's Motion to extend time to file record and [fol. 241] docket the appeal in this cause and the Court being of the opinion said motion should be granted.

It Is, Therefore, The Order, Judgment And Decree of this Court that the time for filing the record of appeal and docketing the appeal in the United States Court of Appeals for the Fifth Circuit, be and it hereby is, extended to and including the 15th day of August 1955.

(S.) T. Whitfield Davidson, Judge.

In United States District Court for the Northern District of Texas, Abilene Division

[Title omitted]

Agreed Designation of Record on Appeal—Filed July 30, 1955

Appellant and Appellee agree that the following portions of the record proceedings and evidence are the complete record of this cause, and Appellant designates the complete record thereof shall be included in the appeal, the record consists of:

1. The Complaint;

2. Defendant's Answer to the Complaint;

3. Amended Complaint;

[fol. 242] 4. Disclaimer of the Plaintiff, R. J. Thomson, complete stenographic record of all evidence and argument of counsel, a copy of which is filed herewith;

5. Appellant's Motion for Instructed Verdict made when Appellee rested her case;

6. Appellant's Motion for Instructed Verdict made at the close of the evidence;

7. Appellant's Requested Special Instruction No. One;

8. The Court's Charge to the Jury;

9. The Verdict of the Jury;

10. The Judgment of the Court;

11. Appellant's Motion for Judgment Notwithstanding the Verdict and in the Alternative for a New Trial;

12. The Court's Order Overruling Appellant's Motion for Judgment Non Obstante Veredicto and in the Alternative for New Trial;

13. Appellant's Notice of Appeal;

14. Appellant's Supersedeas Bond;

15. Appellant's Motion to Extend Time for Docketing this Appeal;

16. Court's Order Extending Time for Docketing this Appeal;

[fol. 243] 17. This Designation.

Wagstaff, Harwell, Alvis & Pope, By J. B. Look, Jr., (J. B. Look, Jr.), Attorneys for Appellant.

P. O. Box 360,
Abilene, Texas.

Approved:

Scarborough, Yates, Scarborough & Black, By Beverly Tarpley, Attorneys for Appellee.

Alexander Building, Abilene, Texas.

[fol. 244] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 245] Argument and Submission—April 14, 1956 (omitted in printing)

[fol. 246] In the United States Court of Appeals for the Fifth Circuit

No. 15743

Texas & Pacific Railway Company, Appellant,

versus

Ruby Nell Thomson, Appellee

Appeal from the United States District Court for the Northern District of Texas

Opinion—April 25, 1956

Before Hutcheson, Chief Judge, and Tuttle and Cameron, Circuit Judges

Cameron, Circuit Judge: This appeal involves the question whether, under the Federal Employers Liability Act, the evidence established any negligence proximately caus-

ing back injuries to a lady agent-operator sustained while she was performing her duties in handling mail from the truck to the railway mail car. Appellee Thomson sued appellant railway company, alleging that she was negligently [fol. 247] injured December 3, 1952 while performing such duties at Monahans, Texas, basing her claim upon her assertion that the handling of the unusually large mail on that date was beyond her physical strength and that she asked her employer for help, which it refused. The Court below submitted the case to the jury on that charge of negligence, refusing the Railroad's request for directed verdict made at the conclusion of the plaintiff's testimony, and repeated at the conclusion of all the testimony. The jury returned a verdict for $5,700.00 in favor of plaintiff-appellee and against defendant-appellant upon which judgment was duly entered, from which this appeal is prosecuted.

The Railroad contended before the Court below that Thomson had failed completely to sustain the charge of requested and refused assistance upon which her action was based, and argues here that the Court below committed error in refusing to direct the jury to return a verdict in its favor. A careful review of the evidence discloses that the Railroad's position is sound and that the Court below should have directed a verdict in its favor.

The evidence of plaintiff showed that she began working for the Railroad in 1943, being then on the extra board as telegraph operator and working only at infrequent intervals followed by a period during which she ceased working entirely. She went back to work in 1951 and was placed again on the extra board and worked at several agencies of the Railroad. She "bid in" the job at Monahans, Texas, and went regularly to work there in October, 1952, and worked until she claims to have been injured December 3rd [fol. 248] of the same year. She knew when she claimed her right to the Monahans assignment that, although the same work at some stations on the road did not involve the handling of baggage or mail by the agent-operator, the job at Monahans did involve such handling.[1]

[1] She testified that, in September, 1951, she had bid in the job at Colorado City as agent-operator, and that her

Upon entering upon her duties at Monahans she began the usual handling of mail and had some conversation with the agent, who was her superior, about the clothes she should wear. The agent preferred that she wear female attire, but she objected mildly to that because it was hard to get onto and off of the mail trucks while attired in a "skirt and hose"; and she found it particularly [fol. 249] awkward when men were in view. For some reason she stopped for a while participating in the handling of the mail and the duty was done entirely by a couple of laborers who worked at the station. When, about a month before the day of her injury, the agent observed that she was not performing her duties in connection with the handling of the mail, he told her that this was a part

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duties were "to handle train orders, copy telegrams, . . . sell tickets, handle mail, baggage, check baggage, and do such clerical work as the agent at each station sees fit to assign . . .". When she asked what her work was to be when she bid in the Monahans job, she replied:

"Well, I was to work from 12:00 midnight until 8:00 in the morning, sell tickets, handle my train orders, and my train, take care of any clerical work that the agent saw fit to assign to me, and work the passenger train, I had one passenger train on my shift and it came at 7:20 in the morning and I was to work the mail and baggage, just anything that the agent saw fit to assign."

She further testified that it was "normally part of the agent-operator's job to handle mail"; and that "there are very few places, like I just said, that doesn't handle the mail, that doesn't have any mail to handle . . ."; and that she had "worked the mail as an operator, and that is kind of standard throughout the railroad . . .". She further admitted that she knew what her duties would be before she moved to Monahans and that they would involve the handling of the mail. When asked how many mail pouches she handled on the day of her injury she replied: "Like I say, I worked the mail so many places I couldn't say as to a number, but I know that there was quite a lot of them . . . say ten or twelve, or maybe fifteen . . .". The mail on the morning train, No. 2, was by far the lightest of any train stopping there.

of the duty of her position and that she should continue to perform that duty. They had a further conversation at that time about the wearing of "hose and skirts"; and the agent again expressed a preference that she wear the clothes normally worn by ladies, but emphasized to her that the job came first and that she could dress as she desired or as she thought necessary for the proper performance of her duties. At no time did she intimate that she felt that the work was too strenuous for her or that she desired to have assistance in performing it.

On the morning she stated she received the injuries, she handled the mail alone as she had done on frequent other occasions and as was the usual custom. The Post Office authorities had placed on the flat surface of the usual four-wheeled truck employed in such work something like ten to fifteen mail sacks. She pushed the truck along the asphalt platform and backed it into the mail car and chocked the wheels. She then mounted the truck and "moved" the mail sacks onto the floor of the mail car.[2] Some of the bags, according to her estimate, [fol. 250] weighed as high as fifty to seventy-five pounds each. When the truck had been completely unloaded, the mail clerk on the car began lifting the sacks of mail destined for Monahans onto the truck and appellee would "put it and stack it on my cart." She did not testify how many sacks came off of the mail car or how much they weighed.

Before she completed this operation she found herself suddenly fatigued and, when the unloading had been com-

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[2] ". . . and then you climb up on the wheel to the cart, and then you start moving the . . . mail from the cart into the car, into the mail car, and he [the railway mail clerk] works it out of the way; you are not supposed to get into the car and he is not supposed to get off of the car on to the cart; . . . and then he lifts the, what he has for me, off, and I put it and stack it on the cart."

Apparently the floors of the mail truck and the car were substantially on a level. Appellee did not make it clear whether she lifted the bags to the car or dragged them; but it is clear that the railway mail clerk lifted the incoming mail onto the mail truck.

pleted and she had gotten down off of the truck, she experienced severe pain in her back. She did not remember whether she rolled the truck away from the train or not. She worked on about twenty or thirty minutes until her normal quitting time and then went home. A couple of days later she consulted a doctor and was subsequently carried to the Railroad hospital where she was entitled to free treatment by reason of contributions made by her each payday. She remained in the hospital until March, 1953, except for four days' work she performed in January. She worked with fair regularity from March, 1953 until October, 1954, being careful each time to bid in a job which did not entail the handling of mail or baggage. The medical testimony disclosed that she had serious trouble in her back. The doctors for the Railroad Company attributed the trouble to congenital pathology, while plaintiff's doctors were of the opinion that the heavy work aggravated an already existing arthritic condition of the spine.

[fol. 251] Appellee offered no evidence at all to sustain the basic charge of her complaint [3] that she asked for and

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[3] Both her original complaint and her amended complaint contained these allegations:

"Plaintiff says that on or about 3 December, 1952 plaintiff was employed by the defendant as an agent at Monahans, Texas. That as an agent, her duties included among other things meeting the trains as they arrived in this station. On this day when the Plaintiff met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman and that the mail was extremely heavy, *she asked her immediate superior,* a man whose name is unknown to the Plaintiff at this time, *for help* in unloading this heavy mail, *but that her superior not only failed, but refused to give her any assistance whatsoever in unloading* this heavy mail even though he and other people were available for assistance. *Plaintiff says that this immediate superior then ordered the Plaintiff to unload the mail* [and] as she was attempting to do so, she injured her back . . ." [Emphasis supplied].

was refused assistance in handling the "unusually large quantity of mail" on the day of her injury.

The Court below submitted the case to the jury on that charge of negligence alone, using a most identical language.[4] Appellee was asked several times if she requested any additional help or asked certain named individuals to help her, and she stated categorically that she did not ask any help.[5] The testimony quoted in the note represents [fol. 252] the closest approach made by appellee to sustaining the charges on which she relied in her complaint. The agent and all of the other employees testified that

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[4] The Court charged the jury in part:

"Plaintiff alleges . . . that her duties included among other things meeting the train upon its arrival at the station and to receive and look after the incoming mail; that on said date she observed unusually large quantities of mail, approaching the Christmas season. She asked her superiors for help to unload the heavy mail, which was refused her although assistants were then available, that she was then ordered to unload the mail . . ."

[5] When asked on cross-examination (the matter not having been covered on direct examination) whether she asked Jack Kittrell or Slick Sligh to help her with her mail, she replied, "No. I had been instructed I was not to ask, I couldn't have anyone to work the mail with me, there wasn't any need to ask". When pressed a little further with the question: "Actually, wasn't the duties outlined to you to assist with the mail and baggage?", she replied: "No. Mr. Higginbotham told me, now, this is just oral, but this is what he said, the best I can remember, I was to take this one car, this one truck, and take it out and take what is on there and put it on the train and take this on the train and bring it and put it back into the baggage room."

As stated, her counsel, on direct examination, developed, in meticulous detail, everything which was said between her and her superior and she did not intimate that she had been instructed to perform the mail handling alone or was not to request assistance.

they were not requested to help with the mail and the agent further stated that at no time had he ever told appellee or anyone else that the duties must be performed without assistance.

At all events, taking appellee's own statements and drawing therefrom all permissible inferences, there is no tendency on the part of the evidence to sustain the charge quoted above that she had, on December 3rd, requested assistance in unloading an unusually large quantity of Christmas mail and had been refused such assistance. By basing her complaint on this allegation and by placing it before the jury as the sole charge of negligence, she recognized that, under the law, she had no case unless she could sustain this charge of negligence.[6]

[fol. 253] Under the simple terms of the Federal Employers Liability Act [7] negligence is the basis of liability. The Railroad here was not an insurer of plaintiff's safety, and before recovery can be had plaintiff must show by the evidence that her injury was the proximate result of

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[6] The complaint mentions the failure of the Railroad to furnish plaintiff a reasonably safe place in which to work, but no evidence at all was offered on that ground, and it may be considered abandoned.

Appellee argues in her brief that it was negligence for the agent at Monahans to require her to work in a dress instead of men's clothing, and also that it was negligence for the Railroad to put plaintiff back to working the mail after she had been exempted from it for a while. It is undisputed, however, that she bid the job in with knowledge that she had to perform these duties. No law is cited tending to support that contention nor the thesis that plaintiff was entitled to special consideration because she was a woman.

[7] "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

the Railroad's charged negligence.[8] "The Act does not make the employer the insurer of the safety of his employees. The basis of his liability is negligence, not the fact that injuries occur." *Ellis v. Union Pacific, supra.* "The weight of the evidence under the . . . Act must be more than a scintilla before the case may be properly left to the discretion of . . . the jury. When the evidence is such . . . there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . . The rule as to when a directed verdict is proper . . . is applicable to questions of proximate cause." *Brady v. Southern Railway Company, supra.* [fol. 254] Our attention is called to two cases under F. E. L. A. which are closely in point. In *Louisville & Nashville Railroad Co. v. Green,* S. Ct. Ala., 1951, 53 So. 2d 358, recovery was sought under the Act by a night station porter who claimed to have been injured because of insufficient help in lifting mail onto a truck in the depot at Athens, Alabama. There were about fifty mail bags on the truck and he attempted to place one weighing from 100 to 150 pounds on top of this load about twelve inches higher than his head. The bag fell onto Green's shoulders, causing double hernia. The Alabama Supreme Court discussed the Supreme Court case of *Tiller v. Atlantic Coast Line,*

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[8] Ellis v. Union Pacific Railroad Co., 1949, 329 U. S. 649; Brady v. Southern Railway Company, 1943, 320 U. S. 476; Lavender v. Kurn, 1946 327 U. S. 645; and Wilkinson v. McCarthy, Trustee, 1949, 336 U. S. 53.

There has been an undercurrent of criticism of F. E. L. A. because proof of negligence is made a *sine qua non* of recovery. *Cf.* dissent of Mr. Justice Frankfurter in Stone v. N. Y. C. & St. L. R. R. Co., 344 U. S. 407, 410, and also his dissent in the Wilkinson case *supra,* p. 66. But Congress has not seen fit to turn this statutory cause of action into a Workmen's Compensation Act, and the Supreme Court has steadfastly disavowed any intention to endeavor to make such a change itself. The concurring opinion of Mr. Justice Douglas in the Wilkinson case, pp. 68-73, contains a good discussion of the attitude of the Supreme Court in F. E. L. A. cases.

1943, 318 U. S. 54, commented on the complete abolition of the doctrine of assumption of risk, and rejected any consideration of Green's contributory negligence, concluding (p. 363): "Here the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances . . . On the record before us we cannot say that the issue of appellant's negligence is debatable, and that fairminded men might reach different conclusions. The employer is not liable for injuries which it could not avoid in the observance of its duty of care. The situation here simply shows a regrettable incident for which the appellant is not responsible, since its duty to appellee was fully discharged. The affirmative charge should have been given for appellant. . . ."

In *Wadiak v. Illinois Central R. R. Co.*, 7 Cir., 1953, 208 F. 2d 925, a judgment under F. E. L. A. was reversed for failure of the trial court to direct a verdict for the railroad. Wadiak was engaged with and under the supervision [fol. 255] of his gang boss in lifting barrels weighing about 300 pounds each. All of them were lifted by a chain hoist except the last, which his co-laborer suggested they raise by hand. In so doing, Wadiak injured his back to such an extent that he was forced to retire on pension. No request was made of the railroad to furnish additional help. The Court of Appeals reversed a judgment allowing recovery, using this language: "In the absence of proof that such aid was sought and was denied to him or that any need for help was brought to the defendant's notice, plaintiff cannot rely on this contention. [citing the *Green* case, *supra.*]" In support of the doctrine that "On this record, indulging every permissible presumption in plaintiff's favor, there was insufficient evidence to take the case to the jury on any of the charges of negligence", the court cited our case of *Reynolds v. Atlantic Coast Line Railroad Co.*, 5 Cir., 1952, 196 F. 2d 694.

As tending further to support these cases see also *August v. T. & N. O. R. Co.*, Tex. Civ. App., 1954, (writ refused N. R. E.) 265 S. W. 2d 148; *Great Atlantic & Pacific Tea Co. v. Evans*, S. Ct. Tex. 1943, 175 S. W. 2d 249; and *Jackson v. Illinois Northern Ry. Co.*, 7 Cir., 1955, 224 F. 2d 76.

Appellee cites no authorities supporting her position, her only two federal court decisions[9] being easily distinguishable. The *Patton* case did not involve either lift-[fol. 256] ing or the sufficiency of the number of workmen to do the work at hand. The *Blair* case did involve the duty of the master to furnish sufficient competent help to move some steel pipes weighing about 1,000 pounds each, but the facts involved caused the decision to rest upon legal principles not applicable here. There, Blair went to his superior telling him that the pipes were too heavy for three men to unload, but his suggestion was rejected and he was told to go ahead and do the work or the railroad "would get somebody else that would". Moreover, the pipes were greased, which caused the pipe injurying Blair to slip as the result of which the other two men released their holds, producing a kick-back which occasioned Blair's injury. A defective condition of the warehouse floor also contributed to the injury.

The case of *Stone v. N. Y. C. & St. L. Railroad Co.*, 1953, 343 U. S. 407, also involved a strained back resulting from pulling too hard in an effort to remove a cross-tie which had been made fast by old spikes protruding downward from the tie into the ground. Stone complained that the two men assigned to the job could not perform it, but he was told by his superior [p. 408] to pull harder or "I will get somebody that will". Stone's efforts to obey this command resulted in his back injury. The case is distinguished by the specific protest made against following a course which would over-tax the employee's strength to which was added criticism of the employment of that particular method of removing ties under the circumstances in preference to others which were available. Two cases involving physical strain have been decided by this Court,[10] but [fol. 257] in each of those protest was made to the mas-

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[9] Patton v. Texas & Pacific Ry. Co., 1901, 179 U. S. 648, and Blair v. Baltimore & Ohio R. R. Co., 1945, 323 U. S. 600.

[10] Montgomery Ward & Co. v. Lindsey, 1939, 104 F. 2d 882, and Pitman v. Shultz, 1942, 125 F. 2d 82.

ter at the time of the excessive strain and in each instance the servant was told by the master, in spite of the protest, to proceed with the work which occasioned the injury.

The present case is not like any of those cited, it being admitted that appellee did not call the Railroad's attention to the unusual quantity of mail on the day of her claimed injury and did not ask any assistance in handling it. Her claim is based rather on the sum total of the operation of loading and unloading the mail on this particular day than on the weight of any particular sack of mail. There is no showing that she had ever intimated to the Railroad that the method of doing the work was improper, that the quantity of the work was too great for her to perform or that the presence of any other workman on the truck—if there were room for more than one—would have been of assistance to her except to replace her in the doing of the work. She pitched her case entirely on the assertion that she asked for additional help to handle the unusually large amount of mail on that particular day, and the Court submitted the case to the jury on that theory alone. Appellee failed entirely to offer any evidence to support that charge of negligence and her proof failed to sustain any other theory of possible recovery. We are of the opinion, therefore, that the Court below should have sustained the motion for directed verdict. For its failure so to do, its judgment is reversed and the case is remanded to the lower [fol. 258] Court for entry of a judgment in favor of appellant.

Reversed.

[fols. 259-275] IN UNITED STATES COURT OF APPEALS

No. 15743

TEXAS & PACIFIC RAILWAY COMPANY,

versus

RUBY NELL THOMSON

JUDGMENT—April 25, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for entry of a judgment in favor of appellant;

It is further ordered and adjudged that the appellee, Ruby Nell Thomson, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

* * * * * * *

[fol. 276] [Title omitted]

ORDER DENYING REHEARING—May 24, 1956

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 277] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 278] SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1956

No. 321

RUBY NELL THOMSON, Petitioner,

vs.

TEXAS & PACIFIC RAILWAY COMPANY

ORDER ALLOWING CERTIORARI—Filed October 22, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3407-4)

AUG 15 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

• • •

No. 321

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RUBY NELL THOMSON, *Petitioner*,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*.

• • •

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

• • •

DALLAS SCARBOROUGH,
DAVIS SCARBOROUGH,
SCARBOROUGH, YATES,
SCARBOROUGH & BLACK,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

No.....

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RUBY NELL THOMSON, *Petitioner,*

vs.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent.*

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The Judgment of the United States District Court for the Northern District of Texas is not reported. A copy thereof is attached hereto in the appendix as Exhibit A, and also appears in the printed transcript. The opinion of the United States Court of Appeals for the Fifth Circuit is reported in 232 F. 2d 313, (C. A. 5, 1956) and also appears in the printed transcript filed with this application. This final judgment of the Court of Appeals on which rehearing was denied reversed the judgment of the trial court for petitioner and rendered judgment for the respondent.

JURISDICTION

The judgment of the Court of Appeals was entered on 25 April 1956, and the motion for rehearing in that

Court was overruled on 24 May 1956 and entered the same day. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A. Sec. 1254(1). This is a case wherein a Court of Appeals has rendered a decision in conflict with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

Where there is evidence of negligence proximately causing an injury which is submitted to the Jury and passed on by the Jury in a cause of action arising under the Federal Employers' Liability Act does an Appellate Court have the right to pass on the weight and credibility of that evidence so as to over turn a Jury verdict?

STATUTES INVOLVED

The statutory provisions under which this case arises and which are controlling are:

1. The Federal Employers' Liability Act. 45 U. S. C. A. ¶ 51 (Apr. 22, 1908, c. 149, ¶ 1, 35 Stat. 65; Aug. 11, 1939, c. 685, 53 Stat. 1404). "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the

next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, ¶ 1, 35 Stat. 65; Aug. 11, 1939, c. 685, ¶ 1, 53 Stat. 1404.

2. 45 U. S. C. A. ¶ 54, Apr. 22, 1908, c. 149, ¶ 4. 35 Stat. 66; Aug. 11, 1939, c. 685, ¶ 1, 53 Stat. 1404. "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Ruby Nell Thomson was employed by the Texas and Pacific Railway Company on 5 September 1951 in the

capacity of an agent-operator. (R. 17). When she first went to work, she worked on the "extra board" which meant that she was shifted from station to station on the railroad's line filling in vacancies created by vacations or sick leave. She worked on the "extra board" until around the 1st of October of 1952 at which time she bid for and received by reason of her seniority a regular assignment as agent-operator at Monohans, Texas. She was to work the shift from 12 midnight until 8 in the morning, handling train orders, telegrams, selling tickets, general clerical work and in addition any duties which her superior at that station saw fit to assign her. (R. 17, 18, 20). In assuming her duties at Monahans petitioner was transferred from one division of the railroad to another division. In the division from which she had been transferred, women employees had been told to wear skirts and hose and dress as a woman normally would. (R. 20). Upon being transferred to the division in which Monahans was located, she discussed this question of dress with the assistant superintendent of the western division and was instructed that it was all right for her to wear feminine attire as long as her duties were performed satisfactorily. This made it impossible for her to climb up on the mail carts and handle the mail. (R. 21). When she assumed her duties at Monahans, a Mexican laborer named Vasquez was handling the mail and he continued to handle the mail up until a few days before this accident occurred. (R. 22, 141). In the latter part of November, 1952, the petitioner's immediate superior at Monahans, the witness Higginbotham, told the petitioner that she had to handle the mail and that she had to handle the mail alone. Mrs. Thomson told her superior at that time that the laborer Vasquez had

been handling the mail; that she could not handle the mail and wear skirts and hose as she had been instructed to do. (R. 20, 56). Those instructions had been given by the assistant superintendent of the division who was Higginbotham's superior as well as petitioner's. (R. 23). She was told by Higginbotham that she had hired out to do a man's job, was receiving the same pay and those were the duties that he saw fit to assign her. (R. 23). Higginbotham did *not* complain that the trains had been delayed or that the mail had not been satisfactorily handled.

Handling the mail meant pulling a cart (see picture R. 46) loaded with bags of mail out to the waiting train. Petitioner then had to pick up each bag of mail weighing from fifty to seventy-five pounds each up off the floor of the cart, bounce them on her knee and onto the floor of the R. P. O. car. She then picked up the incoming mail off the floor of the railroad car and swung it over onto the mail cart. (R. 37-39). The loaded mail cart was then pulled back to the mail room of the station. Several days after the conversation with Higginbotham while petitioner was in the middle of loading and unloading some twelve or fifteen of these bags of mail she felt a sudden nausea and dizziness. As she got down from the cart and started pulling it back to the station she felt a sharp pain in her back and her disability followed. (R. 39, 40).

The jury in the Trial Court returned a verdict for the petitioner for Five Thousand Seven Hundred and no/100 ($5,700.00) Dollars and a judgment was entered accordingly. The Court of Appeals for the Fifth Circuit reversed and rendered this judgment on the grounds that petitioner had failed to present any evi-

dence of negligence to support the jury verdict. From that decision and the order overruling petitioner's motion for rehearing, comes this petition for certiorari.

ARGUMENT

POINT I

The direct order to petitioner to handle the mail alone in violation of custom and the forseeable consequences of that order were factors which the jury only could evaluate.

This Court has been ever vigilant in safeguarding the right to trial by jury to injured workers in cases arising under the Federal Employers' Liability Act. To allow the decision of the lower Court to stand in the case at bar would mean not just the denial of a remedy to one individual but would set a precedent, sanctioned by this Court's silence, on which further inroads on this precious right might be grounded. The Court of Appeals has taken upon itself here the task of reweighing the evidence and drawing conclusions different from those of the jury. This is beyond its province and such a function has been repeatedly denied to it. *Tennant vs. Peoria & P. U. Ry. Co.*, 321 U. S. 29; 64 S. C. 409 (1944); *Blair vs. Baltimore and O. R. Co.*, 323 U. S. 600; 65 S. Ct. 545; 89 Ed. 490 (1945); *Schulz vs. Pennsylvania Railroad Co.*, ...U. S.....; 76 S. Ct. 608 (1956). It is our sincere contention that the Court below incorrectly analyzed the facts presented in the record and on the basis of that analysis reversed the decision of the Trail Court.

The opinion of the Circuit Court sets forth that petitioner began the usual handling of the mail as soon as she began her duties at Monahans. In fact the record

shows that she had been instructed at her previous point of occupation that she was to wear feminine dress which rendered it impossible for her to climb upon the mail carts and handle the mail. This instruction was reaffirmed at her new station. As she began her duties at Monohans, therefore, the mail was being handled by the Mexican laborer Vasquez (R. 21). The Court below draws the inference that it was the usual and customary operation for the agent, Mrs. Thomson, to handle the mail at Monohans. In fact, the record shows that at least to Mrs. Thomson the custom, up until the time that her instructions were changed, were that the laborer was to handle the mail. She did not handle the mail at all until some two or three days before this accident occurred. (R. 21). The Court below further concludes that the petitioner never asked for or was refused assistance in handling the mail at her station. The record discloses, however, that she had been specifically instructed that she was to handle the mail alone and without assistance. (R. 23, 56). The only evidence that it was part of petitioner's customary duties to handle the mail *alone* is the bare statement to that effect by the Court of Appeals. Even respondent contended only that it was her job to *assist* with the mail, and that others were also assigned to that duty. (R. 118). Higginbotham, the station agent, specifically testified that it was the duty of *both* petitioner and the laborer. (R. 126). This testimony was born out by all the rest of respondent's witnesses. (R. 131, 135). This evidence opposed to the testimony of petitioner that she had been instructed to handle the mail alone and that she did handle the mail alone on the morning of the injury presented a square issue of fact which the jury should and did decide. They had a right to believe

petitioner's statement and to find that it was negligence to order her to work the mail alone when all the evidence showed that it was the custom for her to have assistance at least. Petitioner had been relieved of this duty by the assistant division superintendent. It was again imposed without any help which even respondent admits was customary. The lower Court has not only ignored the rule that all reasonable presumptions are to be indulged in favor of a jury verdict, but they have based their decision on matters which are not even in the record.

It is a matter of common knowledge that women are not as strong physically as men. This Court held in the case of *Lillie vs. Thompson*, 332, U. S. 459; 68 S. Ct. 140 (1947) that the employer was bound to consider the likelihood of a criminal attack on a woman working alone in poorly lighted railroad yards and take reasonable measures to prevent that. We earnestly submit that by the same token this employer, The Texas and Pacific Railway Company, should have forseen the possibility of just such an injury as petitioner's from requiring her to perform tasks requiring heavy physical exertion. The testimony reflects that the duties for which the petitioner was hired were largely clerical in nature, the handling of train orders, selling tickets, figuring weight bills and receiving telegrams. Petitioner was not hired for the strength of her back. The Mexican Vasquez was hired as a common laborer to handle freight and work mail and baggage. The duty of handling the mail required nothing more than the exertion of physical strength. The record discloses that the petitioner had been instructed that it was all right for her to dress in feminine attire

and as a result not to handle the mail as long as her duties were performed satisfactorily. These instructions were countermanded by the station agent for no apparent reason. The record fails to disclose that the mail was not being satisfactorily handled or that the laborer Vasquez had not been performing the duties. No reason was advanced by the respondent, Texas and Pacific Railway Company, at the trial for the changing of methods in handling this work. On the contrary it was stated by Higginbotham that between 7:00 and 8:00 in the morning, the period during which this train arrived, was the busiest hour of the day so far as the petitioner's duties were concerned. (R. 24).

Petitioner submits that the facts in this case are very similar to those in the case of *Blair vs. Baltimore & O. R. Co.*, 65 S. Ct. 545; 323 U. S. 600; 89 Ed. 490 (1945). There the claimant was injured while attempting to unload some heavy pipes. He had previously told his superior that they did not have enough men. His superior told him to go ahead and do the work or they would get someone who could. This in effect was the same type of direct order as given by petitioner's superior when she was ordered to handle the mail alone and told that she had hired out to do a man's job, and she was going to do it. The Court in the Blair case said that an issue of negligence was presented for the jury.

The case also bears great resemblance to the case of *Stone vs. New York, Chicago and St. Louis Railroad Company*, 73 S. Ct. 358; 344 U. S. 407; (1953). The claimant suffered a back injury as a result of pulling too hard on a railroad tie under direct order of the straw boss. In pointing out that the straw boss had

additional men who could have been put on the job this Court said in that case:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. *Wilkerson vs. McCarthy*, 336 U. S. 53 61; 69 S. Ct. 413, 417; 93 Ed. 497. To us it appears to be a debatable issue on which fair minded men would differ. cf. *Bailey vs. Central Vermont Railroad Company*, 319 U. S. 350, 353; 63 S. Ct. 1062, 1064; 87 Ed. 1444; *Urie vs. Thompson*, 337 U. S. 163, 178; 69 S. Ct. 1018, 1028; 93 Ed. 1282."

Here as there the question is what a reasonably prudent person would have done under the circumstances. Higginbotham, the railroad company employee in charge of this station and petitioner's immediate superior, had other men who could have been put to carrying the mail. He could have relieved petitioner of this responsibility entirely. He thus had an alternative method for performing this job. The likelihood of injury to any person lifting mail beyond the capacity of their strength is obvious and the likelihood of such injury occurring to the petitioner, a woman, should be even more obvious. The duty of the employer becomes more imperative as the risk increases. *Bailey vs. Central Vermont Railway*, 319 U. S. 350, 353; 63 S. Ct. 1062, 1064; 87 L. Ed. 1444.

POINT II

The strict limits applied by the Court of Appeals to petitioner's cause of action violate the rules of substance and procedure laid down by this Court.

The opinion of the Court of Appeals attempts to dis-

tinguish the Stone case, the Blair case, and the Bailey case by saying that in those cases protest was made immediately before the injury. In saying that petitioner has failed to sustain that burden in the case at bar, the Court does not make clear whether it is ruling on a fatal variance of substance or procedure in petitioner's case.

If the Court is ruling that there is a fatal variance between pleadings and proof, then we would interpose the provisions of Rule 15(b) of the Federal Rule of Civil Procedure as follows:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues..."

The evidence of the instructions by petitioner's boss was admitted without objection at the trial, and was submitted to the jury.

If the Court is ruling as a matter of substantive law that the claimant cannot recover because she failed to protest or ask assistance on the morning of 3 December 1952, then it is imposing this burden in spite of a direct order that she was to do it alone. It has distinguished these three cases from the case at bar by the fact that petitioner was not injured on the first time she attempted to carry out the duties negligently assigned by her superior but was hurt the second or third time she attempted to carry out those duties. Such a strict con-

struction is inconsistent with the interpretation of the Federal Employers' Liability Act adopted by this Court.

This liberal construction has again been confirmed by this Court in the recent case of *Schulz vs. Pennsylvania Railroad Company*, 76 S. Ct. 608 (9 April 1956). The facts in the Schulz case and this case are not similar, but there as here the petitioner has the right to recover if the injury resulted "in whole or in part" from the respondent's negligence. This Court there said:

> "In considering the scope of the issues intrusted to juries in cases like this it must be borne in mind that negligence cannot be established by direct precise evidence such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre but measuring negligence is different. The definitions of negligence are not definitions at all strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done or a failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence therefore call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason so long as the jury system is the law of the land and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others.' *Jones vs. East Tennessee, V. & G. R. Co.*, 1888 128 U. S. 443, 445; 9 S. Ct. 118; 32 L. Ed. 478, p. 610."

CONCLUSION

A comparison of the facts quoted in the opinion of the lower Court with the entire record discloses that the lower Court has adopted the defendant's theory of the case, and said on that basis the plaintiff cannot recover. Certainly this is true of every contested case, but the decisions of this Court have specifically denied the authority of a Court to sit as a super jury. This Court has specifically defined the role assumed by the lower Court in this case as being within the province of the jury. We, therefore, submit that the opinion of the Circuit Court should be reversed, and the judgment of the Trial Court reinstated.

Respectfully submitted,

DALLAS SCARBOROUGH,
DAVIS SCARBOROUGH,
SCARBOROUGH, YATES,
SCARBOROUGH & BLACK,
Counsel for Petitioner.

I hereby certify that copy of the above and foregoing application for certiorari together with the appendix was served on J. B. Look, Jr., attorney of record for the respondent by depositing same in the United States mail addressed to him at the Citizens National Bank Building, Abilene, Texas, this the.....day of August, 1956, in accordance with paragraph 1 of Rule 33 of the Supreme Court of Rules.

.....
Attorney for the Petitioner

APPENDIX

* * *

JUDGMENT OF THE TRIAL COURT

(Filed May 7, 1955)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, ABILENE DIVISION

* * *

RUBY NELL THOMSON, *a widow, Plaintiff,* AND R. J. THOMSON, *Involuntary Plaintiff,*

No. 1322 - CIVIL

VS.

T. & P. RAILWAY COMPANY, *Defendant*

* * *

On This 27th day of April, 1955, came on to be heard the above styled and numbered cause and came the plaintiff in person and by attorney and the involuntary plaintiff appeared in person and came the T. & P. Railroad Company by attorney and all parties announced ready for trial. Whereupon a jury consisting of J. L. Collett as foreman and eleven other good and lawful jurors was duly impaneled, and the Court proceeded to hear the pleadings, evidence and arguments of counsel. Whereupon said case was submitted to the jury under charge of the Court and the jury returned the following verdict:

We, the jury, find for the plaintiff and assess her damages at Five Thousand Seven Hundred and no/100 ($5,700.00) Dollars.

(S.) J. L. COLLETT,
Foreman of the Jury.

and Court having received said verdict and having ascertained that it was the verdict of all members of the

jury is of the opinion that the plaintiff is entitled to recover judgment thereon. The Court further finds that the involuntary plaintiff, R. J. Thomson, Jr., appear in open Court and under oath disclaim any and all interest which he might have in and to this cause of action and resulting verdict, and further file a written disclaimer among the papers of this case. The Court finds that the plaintiff, Ruby Nell Thomson, has received proceeds in the amount of One Hundred Eighty-two and no/100 ($182.00) Dollars from the Railroad Retirement Fund and that the said fund is entitled to re-imbursement in that amount out of the proceeds of this judgment.

It Is Therefore Ordered, Adjudged and Received that the plaintiff, Ruby Nell Thomson, do have and recover of and from the defendant, T. & P. Railway Company, the sum of Five Thousand Seven Hundred and no/100 ($5,700.00) Dollars. Said defendant is hereby ordered to pay the sum of One Hundred Eighty-two and no/100 ($182.00) Dollars directly to the Railroad Retirement Fund in satisfaction of its subrogation claim herein and to pay the balance of said sum of Five Thousand Seven Hundred and no/00 ($5,-700.00) Dollars to-wit: Five Thousand Five Hundred Eighteen and no/100 ($5,518.00) Dollars to the plaintiff, Ruby Nell Thomson. All costs in this behalf expended are hereby taxed against the defendant for all of which let execution issue to all of which action the defendant in open Court excepted and gave notice of appeal to the Court of Appeals for the Fifth Circuit.

Entered this 5 day of May, 1955.

(S.) T. WHITFIELD DAVIDSON,
United States District Judge.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

* * *

No. 15743

* * *

TEXAS & PACIFIC RAILWAY COMPANY, *Appellant*,

vs.

RUBY NELL THOMSON, *Appellee*.

* * *

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF TEXAS

* * *

(Filed April 25, 1956)
Reversed and Remanded
Rehearing May 24, 1956)

* * *

Before HUTCHESON, Chief Judge, and TUTTLE and CAMERON, Circuit Judges.

CAMERON, Circuit Judge: This appeal involves the question whether, under the Federal Employers Liability Act, the evidence established any negligence proximately causing back injuries to a lady agent-operator sustained while she was performing her duties in handling mail from the truck to the railway mail car. Appellee Thomson sued appellant railway company, alleging that she was negligently injured December 3, 1952, while performing such duties at Monahans, Texas, basing her claim upon her assertion

that the handling of the unusually large mail on that date was beyond her physical strength and that she asked her employer for help, which it refused. The Court below submitted the case to the jury on that charge of negligence, refusing the Railroad's request for directed verdict made at the conclusion of the plaintiff's testimony, and repeated at the conclusion of all the testimony. The jury returned a verdict for $5,700.00 in favor of plaintiff-appellee and against defendant-appellant upon which judgment was duly entered, from which this appeal is prosecuted.

The Railroad contended before the Court below that Thomson had failed completely to sustain the charge of requested and refused assistance upon which her action was based, and argues here that the Court below committed error in refusing to direct the jury to return a verdict in its favor. A careful review of the evidence discloses that the Railroad's position is sound and that the Court below should have directed a verdict in its favor.

The evidence of plaintiff showed that she began working for the Railroad in 1943, being then on the extra board as telegraph operator and working only at infrequent intervals followed by a period during which she ceased working entirely. She went back to work in 1951 and was placed again on the extra board and worked at several agencies of the Railroad. She "bid in" the job at Monahans, Texas, and went regularly to work there in October, 1952, and worked until she claims to have been injured December 3rd of the same year. She knew when she claimed her right to the Monahans assignment that, although the same work at some stations on the road did not involve the hand-

ling of baggage or mail by the agent-operator, the job at Monahans did involve such handling.[1]

Upon entering upon her duties at Monahans she began the usual handling of mail and had some conversation with the agent, who was her superior, about the

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1. She testified that, in September, 1951, she had bid in the job at Colorado City as agent-operator, and that her duties were "to handle train orders, copy telegrams, . . . sell tickets, handle mail, baggage, check baggage, and do such clerical work as the agent at each station sees fit to assign . . .". When asked what her work was to be when she bid in the Monahans job, she replied:

"Well, I was to work from 12:00 midnight until 8:00 in the morning, sell tickets, handle my train orders, and my train, take care of any clerical work that the agent saw fit to assign to me, and work the passenger train, I had one passenger train on my shift and it came at 7:20 in the morning and I was to work the mail and baggage, just anything that the agent saw fit to assign."

She further testified that it was "normally part of the agent-operator's job to handle mail"; and that "there are very few places, like I just said, that doesn't handle the mail, that doesn't have any mail to handle . . .". She further admitted that she knew what her duties would be before she moved to Monahans and that they would involve the handling of the mail. When asked how many mail pouches she handled on the day of her injury she replied: "Like I say, I worked the mail so many places I couldn't say as to a number, but I know that there was quite a lot of them . . . say ten or twelve, or maybe fifteen . . .". The mail on the morning train, No. 2, was by far the lightest of any train stopping there.

clothes she should wear. The agent preferred that she wear female attire, but she objected mildly to that because it was hard to get onto and off of the mail trucks while attired in a "skirt and hose"; and she found it particularly awkward when men were in view. For some reason she stopped for a while participating in the handling of the mail and the duty was done entirely by a couple of laborers who worked at the station. When, about a month before the day of her injury, the agent observed that she was not performing her duties in connection with the handling of the mail, he told her that this was a part of the duty of her position and that she should continue to perform that duty. They had a further conversation at that time about the wearing of "hose and skirts", and the agent again expressed a preference that she wear the clothes normally worn by ladies, but emphasized to her that the job came first and that she could dress as she desired or as she thought necessary for the proper performance of her duties. At no time did she intimate that she felt that the work was too strenuous for her or that she desired to have assistance in performing it.

On the morning she stated she received the injuries, she handled the mail alone as she had done on frequent other occasions and as was the usual custom. The Post Office authorities had placed on the flat surface of the usual four-wheeled truck employed in such work something like ten to fifteen mail sacks. She pushed the truck along the asphalt platform and backed it into the mail car and chocked the wheels. She then mounted the truck and "moved" the mail sacks onto the floor

of the mail car.[2] Some of the bags, according to her estimate, weighed as high as fifty to seventy-five pounds each. When the truck had been completely unloaded, the mail clerk on the car began lifting the sacks of mail destined for Monahans onto the truck and appellee would "put it and stack it on my cart." She did not testify how many sacks came off of the mail car or how much they weighed.

Before she completed this operation she found herself suddenly fatigued and, when the unloading had been completed and she had gotten down off of the truck, she experienced severe pain in her back. She did not remember whether she rolled the truck away from the train or not. She worked on about twenty or thirty minutes until her normal quitting time and then went home. A couple of days later she consulted a doctor and was subsequently carried to the Railroad hospital where she was entitled to free treatment by reason of contributions made by her each payday. She remained in the hospital until March, 1953, except for

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2. ". . . and then you climb up on the wheel to the cart, and then you start moving the . . . mail from the cart into the car, into the mail car, and he (the railway mail clerk) works it out of the way; you are not supposed to get into the car and he is not supposed to get off of the car on to the cart; . . . and then he lifts the, what he has for me, off, and I put it and stack it on the cart."

Apparently the floors of the mail truck and the car were substantially on a level. Appellee did not make it clear whether she lifted the bags to the car or dragged them; but it is clear that the railway mail clerk lifted the incoming mail onto the mail truck.

four days' work she performed in January. She worked with fair regularity from March, 1953, until October, 1954, being careful each time to bid in a job which did not entail the handling of mail or baggage. The medical testimony disclosed that she had serious trouble in her back. The doctors for the Railroad Company attributed the trouble to congenital pathology, which plaintiff's doctors were of the opinion that the heavy work aggravated an already existing arthritic condition of the spine.

Appellee offered no evidence at all to sustain the basic charge of her complaint[3] that she asked for and

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3. Both her original complaint and her amended complaint contained these allegations:

"Plaintiff says that on or about 3 December, 1952 plaintiff was employed by the defendant as an agent at Monahans, Texas. That as an agent, her duties included among other things meeting the trains as they arrived in this station. On this day when the Plaintiff met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman and that the mail was extremely heavy, *she asked her immediate superior*, a man whose name is unknown to the Plaintiff at this time, *for help* in unloading this heavy mail, *but that her superior not only failed, but refused to give her any assistance whatsoever in unloading* this heavy mail even though he and the other people were available for assistance. *Plaintiff says that this immediate superior then ordered the Plaintiff to unload the mail* (and) as she was attempting to do so, she injured her back . . ." (Emphasis supplied).

was refused assistance in handling the "unusually large quantity of mail" on the day of her injury.

The Court below submitted the case to the jury on that charge of negligence alone, using almost identical language.[4] Appellee was asked several times if she requested any additional help or asked certain named individuals to help her, and she stated categorically that she did not ask any help.[5] The testimony quoted

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4. The Court charged the jury in part:

   "Plaintiff alleges . . . that her duties included among other things meeting the train upon its arrival at the station and to receive and look after the incoming mail; that on said date she observed unusually large quantities of mail, approaching the Christmas season. She asked her superiors for help to unload the heavy mail, which was refused her although assistants were then available, that she was then ordered to unload the mail . . ."

5. When asked on cross-examination (the matter not having been covered on direct examination) whether she asked Jack Kittrell or Slick Sligh to help her with her mail, she replied, "No. I had been instructed I was not to ask, I couldn't have anyone to work the mail with me, there wasn't any need to ask." When pressed a little further with the question: "Actually, wasn't the duties outlined to you to assist with the mail and

in the note represents the closest approach made by appellee to sustaining the charges on which she relied in her complaint. The agent and all of the other employees testified that they were not requested to help with the mail and the agent further stated that at no time had he ever told appellee or anyone else that the duties must be performed without assistance.

At all events, taking appellee's own statements and drawing therefrom all permissible inferences, there is no tendency on the part of the evidence to sustain the charge quoted above that she had, on December 3rd, requested assistance in unloading an unusually large quantity of Christmas mail and had been refused such assistance. By basing her complaint on this allegation and by placing it before the jury as the sole charge of negligence, she recognized that, under the law, she had

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baggage?", she replied: "No. Mr. Higginbotham told me, now, this is just oral, but this is what he said, the best I can remember, I was to take this one car, this one truck, and take it out and take what is on there and put it on the train and take this on the train and bring it and put it back into the baggage room."

As stated, her counsel, on direct examination, developed, in meticulous detail, everything which was said between her and her superior and she did not intimate that she had been instructed to perform the mail handling alone or was not to request assistance.

no case unless she could sustain this charge of negligence.[6]

Under the simple terms of the Federal Employers Liability Act[7] negligence is the basis of liability. The Railroad here was not an insurer of plaintiff's safety, and before recovery can be had plaintiff must show by the evidence that her injury was the proximate result

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6. The complaint mentions the failure of the Railroad to furnish plaintiff a reasonable safe place in which to work, but no evidence at all was offered on that ground, and it may be considered abandoned.

   Appellee argues in her brief that it was negligence for the agent at Monahans to require her to work in a dress instead of men's clothing, and also that it was negligence for the Railroad to put plaintiff back to working the mail after she had been exempted from it for a while. It is undisputed, however, that she bid the job in with knowledge that she had to perform these duties. No law is cited tending to support that contention nor the thesis that plaintiff was entitled to special consideration because she was a woman.

7. "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . ."

of the Railroad's charged negligence.[8] "The Act does not make the employer the insurer of the safety of his employees. The basis of his liability is negligence, not the fact that injuries occur." *Ellis vs. Union Pacific, supra.* "The weight of the evidence under the . . . Act must be more than a scintilla before the case may be properly left to the discretion of . . . the jury. When the evidence is such . . . there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by . . . directed verdict . . . The rule as to when a directed verdict is proper . . . is applicable to questions of proximate cause." *Brady vs. Southern Railway Company, supra.*

Our attention is called to two cases under F. E. L. A. which are closely in point. In *Louisville & Nashville*

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8. *Ellis vs. Union Pacific Railroad Co.*, 1949, 329 U. S. 649; *Brady vs. Southern Railway Company*, 1943, 320 U. S. 476; *Lavender vs. Kurn*, 1946, 327 U. S. 645; and *Wilkinson vs. McCarthy, Trustee*, 1949, 336 U. S. 53. There has been an undercurrent of criticism of F. E. L. A. because proof of negligence is made a sine qua non of recovery. Cf. dissent of Mr. Justice Frankfurter in *Stone vs. N. Y. C. & St. L. R. R. Co.*, 344 U. S. 407, 410, and also his dissent in the Wilkinson case supra, p. 66. But Congress has not seen fit to turn this statutory cause of action into a Workmen's Compensation Act, and the Supreme Court has steadfastly disavowed any intention to endeavor to make such a change itself. The concurring opinion of Mr. Justice Douglas in the Winkinson case, pp. 68-73, contains a good discussion of the attitude of the Supreme Court in F. E. L. A. cases.

Railroad Co. vs. Green, S. Ct. Ala., 1951, 53 So. 2d. 358, recovery was sought under the Act by a night station porter who claimed to have been injured because of insufficient help in lifting mail onto a truck in the depot at Athens, Alabama. There were about fifty mail bags on the truck and he attempted to place one weighing from 100 to 150 pounds on top of this load about twelve inches higher than his head. The bag fell onto Green's shoulders, causing double hernia. The Alabama Supreme Court discussed the Supreme Court case of *Tiller vs. Atlantic Coast Line*, 1943, 318 U. S. 54, commented on the complete abolition of the doctrine of assumption of risk, and rejected any consideration of Green's contributory negligence, concluding (p. 363): "Here the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances . . . On the record before us we cannot say that the issue of appellant's negligence is debatable, and that fairminded men might reach different conclusions. The employer is not liable for injuries which it could not avoid in the observance of its duty of care. The situation here simply shows a regrettable incident for which the appellant is not responsible, since its duty to appellee was fully discharged. The affirmative charge should have been given for appellant. . ."

In *Wadiak vs. Illinois Central R. R. Co.*, 7 Cir., 1953, 208 F. 2d 925, a judgment under F. E. L. A. was reversed for failure of the trial court to direct a verdict for the railroad. Wadiak was engaged with and under the supervision of his gang boss in lifting barrels weighing about 300 pounds each. All of them were lifted by a chain hoist except the last, which his co-

laborer suggested they raise by hand. In so doing, Wadiak injured his back to such an extent that he was forced to retire on pension. No request was made of the railroad to furnish additional help. The Court of Appeals reversed a judgment allowing recovery, using this language: "In the absence of proof that such aid was sought and was denied to him or that any need for help was brought to the defendant's notice, plaintiff cannot rely on this contention, (citing the *Green* case, *supra.*)" In support of the doctrine that "On this record, indulging every permissible presumption in plaintiff's favor, there was insufficient evidence to take the case to the jury on any of the charges of negligence," the court cited our case of *Reynolds vs. Atlantic Coast Line Railroad Co.*, 5 Cir., 1952, 196 F. 2d 694.

As tending further to support these cases see also *August vs. T. & N. O. R. Co.*, Tex. Civ. App., 1954, (writ refused N. R. E.) 265 S. W. 2d 148; *Great Atlantic & Pacific Tea Co. vs. Evans*, S. Ct. Tex. 1943, 175 S. W. 2d 249; and *Jackson vs. Illinois Northern Ry. Co.*, 7 Cir., 1955, 224 F. 2d 76.

Appellee cites no authorities supporting her position, her only two federal court decisions[9] being easily distinguishable. The *Patton* case did not involve either lifting or the sufficiency of the number of workmen to do the work at hand. The *Blair* case did involve the duty of the master to furnish sufficient competent help to move some steel pipes weighing about 1,000 pounds each, but the facts involved caused the decision to rest

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9. *Patton vs. Texas & Pacific Ry. Co.*, 1901, 179 U. S. 648, and *Blair vs. Baltimore & Ohio R. R. Co.*, 1945, 323 U. S. 600.

upon legal principles not applicable here. There, Blair went to his superior telling him that the pipes were too heavy for three men to unload, but his suggestion was rejected and he was told to go ahead and do the work or the railroad "would get somebody else that would". Moreover, the pipes were greased, which caused the pipe injuring Blair to slip as the result of which the other two men released their holds, producing a kick-back which occasioned Blair's injury. A defective condition of the warehouse floor also contributed to the injury.

The case of *Stone vs. N. Y. C. & St. L. Railroad Co.*, 1953, 343 U. S. 407, also involved a strained back resulting from pulling too hard in an effort to remove a cross-tie which had been made fast by old spikes protruding downward from the tie into the ground. Stone complained that the two men assigned to the job could not perform it, but he was told by his superior (p. 408) to pull harder or "I will get somebody that will". Stone's efforts to obey this command resulted in his back injury. The case is distinguished by the specific protest made against following a course which would over-tax the employee's strength to which was added criticism of the employment of that particular method of removing ties under the circumstances in preference to others which were available. Two cases involving physical strain have been decided by this Court,[10] but

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10. *Montgomery Ward & Co. vs. Lindsey*, 1939, 104 F. 2d 882, and *Pitman vs. Shultz*, 1942, 125 F. 2d 82.

in each of those protest was made to the master at the time of the excessive strain and in each instance the servant was told by the master, in spite of the protest, to proceed with the work which occasioned the injury.

The present case is not like any of those cited, it being admitted that appellee did not call the Railroad's attention to the unusual quantity of mail on the day of her claimed injury and did not ask any assistance in handling it. Her claim is based rather on the sum total of the operation of loading and unloading the mail on this particular day than on the weight of any particular sack of mail. There is no showing that she had ever intimated to the Railroad that the method of doing the work was improper, that the quantity of the work was too great for her to perform or that the presence of any other workman on the truck—if there were room for more than one—would have been of assistance to her except to replace her in the doing of the work. She pitched her case entirely on the assertion that she asked for additional help to handle the unusually large amount of mail on that particular day, and the Court submitted the case to the jury on that theory alone. Appellee failed entirely to offer any evidence to support that charge of negligence and her proof failed to sustain any other theory of possible recovery. We are of the opinion, therefore, that the Court below should have sustained the motion for directed verdict. For its failure so to do, its judgment is reversed and the case is remanded to the lower Court for entry of a judgment in favor of appellant.

REVERSED.

SEP 1 1 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 321

[redacted], Petitioner

vs.

TEXAS & PACIFIC RAILWAY COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE [redacted] CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

* * *

NO.....

RUBY NELL THOMSON, *Petitioner*

VS.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF OF RESPONDENT IN OPPOSITION

* * *

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

Petitioner's application correctly sets forth the opinions below.

JURISDICTION

The Court of Appeals below did not render a decision in conflict with applicable decisions of this Court.

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals did not pass upon the weight and credibility of evidence. It merely passed upon the question of whether there was *any* evidence of negligence and proximate cause.

STATUTES INVOLVED

Petitioner's application correctly sets forth the applicable statutes involved.

STATEMENT OF THE CASE

Many of the statements contained in petitioner's statement of the case are not supported in the evidence. The opinion of the Honorable Court of Appeals, 232 F. 2d 313, 314-16 (petitioner's application, pp. 17-23) clearly and precisely sets forth the evidence taken in a light most favorable to petitioner.

COUNTERPOINT I

The mere fact that petitioner was injured at the time she was performing the usual and ordinary functions of her position does not establish any evidence of negligence.

ARGUMENT

The petitioner had worked for respondent as an agent and operator for some time. Handling mail was normally part of such employee's job all up and down the line (R. 43). Petitioner herself had worked many trains prior to her injury, and it was usual, necessary and part of her regular duties (R. 54-55). She had even worked at this same station before and knew the job entailed handling the mail before she bid for this job (R. 49). She had never had any difficulty in performing her duties, including handling the mail, before the instance in question.

She alleged that she had a conversation with her superior prior to this time in which she told him that the work was too strenuous for her (R. 11-12), but upon the trial petitioner herself testified that the only conversation she had with her superior was to the effect that she could not wear skirts and hose and

handle the mail (R. 21). It was the policy that women should wear skirts and hose if they could still perform their duties (R. 54-55), but in this instance her duties included the handling of mail in which she had to crawl on and about the mail carts or "trucks" as they are called in the railroad industry. She furthermore testified that she had never informed anyone of the fact that her duties were too strenuous for her.

Briefly the duties of petitioner in handling the mail were as follows:

The postal employees bring the mail to the station where they load it up on four-wheel carts which in railway parlances are known as "trucks". A picture of such a truck being shown in Defendant's Exhibit No. 1 (R. 46). This truck is in the mailroom which is locked. The operator gets the key to the mailroom, pulls the truck out onto the station platform, and when the train stops, pulls the truck alongside the railway post office car, climbs upon the truck and transfers the mail on the truck to the railway post office car by handing the mail sacks to the railway post office man. The railway post office man then transfers the mail from the railway post office car destined for the particular station onto the truck by handing the mail sacks to the operator on the truck. The operator on the truck, when this operation is completed, pulls the truck off away from the train.

Respondent recognizes that the F. E. L. A. is in all respects to be liberally construed in favor of the employee and all doubts as to the weight and credibility of the evidence resolved in favor of such employee. But there is no question of interpreting the evidence

or drawing conclusions therefrom in the instant case. Petitioner's own testimony, uncontradicted and conclusive, established that she had never requested assistance or claimed the work to be too strenuous for her.

This Honorable Court has repeatedly held in speaking of the Federal Employers Liability Act, that it did not make the employer the insurer of the safety of its employees while they are on duty. See *Ellis vs. Union Pacific Ry. Co.*, 329 U.S. 649, 653; 67 S. Ct. 598, 600; 91 L. Ed. 572 (1947). This Court has furthermore held that when the evidence is such that without weighing the credibility of the witnesses and the weight of the evidence, there can be but one reasonable conclusion, the court should determine the proceedings by nonsuit, directed verdict or otherwise. *Brady vs. Southern Ry. Co.*, 320 U.S. 476; 64 S. Ct. 232; 88 L. Ed. 239.

The discussion petitioner had with her superior in regard to wearing of skirts and hose did not in any manner call the attention of her superior to the fact that the work might be too strenuous for her. See *Cartwright vs. Atchison, T. & S. F. R. Co.*, 228 F. 872 (1915).

Two recent cases directly in point have been found by respondent. In *Wadiak vs. Ill. Central Ry. Co.*, 208 F. 2d 925 (1953), an employee was injured in attempting to lift a 300 pound barrel. The evidence there, as here, showed that he had not requested assistance; and furthermore, there, as here, the railroad did not know of the weight of the object to be lifted or handled. The Court of Appeals held, at page 929:

> "In the absence of proof that such aid was sought and was denied to him, or that any need

for help was brought to defendant's notice, plaintiff cannot rely upon this contention."

Another F. E. L. A. case in point is *Louisville vs. Green*, 255 Ala. 642, 53 So. 2d 358 (1951). In that case an employee was also injured while handling mail and loading it upon a truck similar to the one in the instant case. The evidence showed that the employee had never complained to the railroad that the work of lifting the sacks was too heavy for him. The court properly denied recovery because this very important element of lack of notice was missing from the evidence.

It must furthermore be remembered that the railroad would have no way of knowing of the number of sacks or the weight of any particular sack on this occasion inasmuch as this was controlled by employees of the United States Post Office, not under the control of respondent and without respondent being able to obtain any knowledge thereof.

There was no reason for respondent, its agents, servants or employees to foresee that any injury might occur from merely performing the identical duties petitioner was performing inasmuch as the same thing was being done by similar employees all the way up and down the line each day, and petitioner had said herself, on many, many occasions had performed the identical duties.

The cases by this Honorable Court cited by petitioner in her petition for writ of certiorari which deal with straining or insufficient help are clearly distinguishable on the facts.

In *Stone vs. New York & Chicago Railroad Co.*, 73 S. Ct. 358; 344 U.S. 407; 98 L. Ed. 441 (1953), the

injured employee and another were trying to remove railroad ties, and were having a great deal of difficulty. The injured man complained that he could not pull any harder and that more men were needed, whereupon the foreman told him that if he couldn't pull any harder the foreman would get somebody that would. Thus the railroad was given actual notice and disregarded the notice, ordering the worker to continue, and as a result he was injured. This properly presented a jury issue.

The other case cited by petitioner is *Blair vs. Baltimore & Ohio R. Co.*, 323 U.S. 600; 65 S. Ct. 545; 89 L. Ed. 490 (1945) wherein a man was injured while being required to carry pipes with insufficient help. There, again, the injured employee told his supervisor that the pipes were heavy and greasy, and that more men were required in order to carry these pipes. The supervisor overrode this contention and as a result, one of the pipes was dropped and injured the complaining employee. Again the railroad had notice and when the foreman's order overrode the worker's complaint this presented a jury question of negligence.

Merely requiring an employee to do the usual and customary work required of persons in that line of employment are required by the character of the business is not negligence. See *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 SW 2d 249 (Tex. S. Ct.) (1943). There was no evidence even intimated that petitioner was doing any work other than her normal and customary duties and the normal and customary duties of other persons similarly employed up and down the line. There was no way in which respondent could

reasonably foresee that petitioner would be injured in performing the same duties she had performed many, many times.

COUNTERPOINT II

The Court of Appeals did not violate any rules of substance or procedure laid down by this Honorable Court.

ARGUMENT

We are not here faced with a procedural question on a variance between the pleadings and the proof. The Court of Appeals properly held that as a matter of substantive law, she failed to establish a cause of action for the reasons pointed out in Counterpoint I.

Petitioner went to trial upon one theory of the case and one theory only. Her proof wholly failed in this. However, the Court nevertheless instructed upon this theory of the case. Petitioner did not request any additional or different charges or except to the charge as given (R. 221). It is upon this theory that the petitioner's cause must rest or fall, and upon no other theory.

Rule 51, Federal Rules of Civil Procedure, provides in part: "No party may assign as error the giving or the failure to give an instruction unless he object thereto before the jury retires to consider its verdict . . ." Petitioner did not advance any other possible theory of recovery in the trial court so that the jury might have been instructed thereon, nor did she object to the instruction of the Court to the jury as not covering any possible ground of recovery.

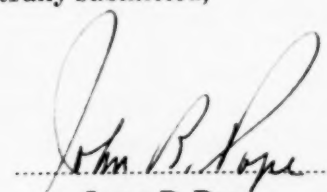
The Court of Appeals correctly decided this case upon the merits and its opinion was based upon substantive law, namely, that the failure of petitioner to apprise respondent that the work was too strenuous for her, when it was not obviously so, was fatal to her cause of action.

Petitioner even in her petition in this court does not set forth any other theory under which she might recover.

CONCLUSION

The clear and precise opinion of the Circuit Court accurately sets forth the fact in a light most favorable to petitioner's cause and clearly and properly pronounces the law applicable thereto. We, therefore, submit that petitioner's application for writ of certiorari should be denied.

Respectfully submitted,



JOHN B. POPE
Attorney for Respondent
WAGSTAFF, HARWELL,
ALVIS & POPE
Of Counsel.

I hereby certify that a copy of the above and foregoing reply to the application for certiorari was served upon Messrs. Dallas Scarborough and Davis Scarborough, attorneys of record for petitioner, by delivering same to them by hand this 10th day of September, 1956.

John B. Pope

JOHN B. POPE
Attorney for Respondent

FEB 21 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 721

[redacted]

Petitioner,

vs.

[redacted]

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

BRIEF ON THE MERITS

[redacted]

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

* * *

No. 321

* * *

RUBY NELL THOMSON, *Petitioner*

VS.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

BRIEF FOR THE PETITIONER

* * *

OPINION BELOW

The opinion of the Court of Appeals (R. 186) is reported in 232 F. 2d 313, (5 C. A. 1956).

JURISDICTION

The judgment of the Court of Appeals was entered on 25 April 1956. Petition for Rehearing was denied by that Court on 24 May 1956.

On 15 August 1956, Petition for Writ of Certiorari was filed and was granted on 22 October 1956. The jurisdiction of this Court is found in C 646 Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A. Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

In cases arising under the Federal Employers' Liability Act, is not the jury the sole body to pass on questions of negligence of the employer proximately causing the injury?

1. The direct order to Petitioner to handle the mail alone in violation of custom and the foreseeable consequences of that order were factors which the jury, and not the Appellate Court, should evaluate.

2. The strict limits applied by the Court of Appeals to Petitioner's cause of action violate the rules of substance and procedure laid down by this Court.

STATUTES INVOLVED

The statutory provisions under which this case arises and which are controlling are:

1. The Federal Employers' Liability Act. 45 U. S. C. A. § 51 (April 22, 1908, c. 149). § 1, 35 Stat. 65; (August 11, 1939, c. 685, 53 Stat. 1404). "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee for

such injury or death resulting in whole or in part from negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65; August 11, 1939, c. 685, Section 1, 53 Stat. 1404.

2. 45 U. S. C. A. Section 53, 22 April 1908, c. 149, Sec. 3, 35 Stat. 66. "In all actions hereafter brought against any such common carrier railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar the recovery, but the damages shall be diminished by the jury in proportion to amount of negligence attributable to such employee; *provided*, that no such employee who may be injured or killed shall be held to be guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of any employees contributed to the injury or death of such employee."

3. 45 U. S. C. A. Section 54, Apr. 22, 1908, c. 149, Section 4, 35 Stat. 66; August 11, 1939, c.

685, Section 1, 53 Stat. 1404. "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

STATEMENT OF THE CASE

Ruby Nell Thomson was employed by the Texas and Pacific Railway Company on 5 September 1951, in the capacity of an agent operator (R. 13). When she first went to work, she worked on the "extra board" which meant that she was shifted from station to station on the railroad line filling in vacancies created by vacations or sick leave. She worked on the "extra board" until the first of October 1952, at which time she bid for and received by reason of her seniority a regular assignment as agent-operator at Monahans, Texas. She was to work the shift from twelve midnight until eight in the morning, handling train orders, telegrams, selling tickets, general clerical work, and in addition, any duties which her superior at that station saw fit to assign her. (R. 14). In assuming her duties at Monahans Petitioner was transferred from one division of the railroad to another division. In the division from which she had been transferred, women employees had been told to wear skirts and hose and dress

as a woman normally would. (R. 15). Upon being transferred to the division in which Monahans was located, she discussed this question of dress with the assistant superintendent of the western division and was instructed that it was all right for her to wear feminine attire as long as her duties were performed satisfactorily. (R. 15, 16). This made it impossible for her to climb up on the mail carts and handle the mail. (R. 16). When she assumed her duties at Monahans, a Mexican laborer named Vasquez was handling the mail, and he continued to handle the mail up until a few days before this accident occurred. (R. 17, R. 107). In the latter part of November, 1952, the Petitioner's immediate superior at Monahans, the witness, Higginbothan, told the Petitioner that she had to handle the mail, and that she had to handle the mail alone. (R. 18, 44). Mrs. Thomson told her superior at that time that the laborer Vasquez had been handling the mail, and that she could not handle the mail and wear skirts and hose as she had been instructed to do. (R. 18). Those instructions had been given by the Assistant Superintendent of the division who was Higginbothan's superior as well as Petitioner's. (R. 17). She was told by Higginbothan that she had hired out to do a man's job, was receiving the same pay and those were the duties that he saw fit to assign her. (R. 18). Higginbothan did *not* complain that that the trains had been delayed or that the mail had not been satisfactorily handled.

Handling the mail meant pulling a cart (Def. Ex. 1, R. 36, 37), loaded with bags of mail out to the waiting train. Petitioner then had to pick up the bags of mail weighing from fifty to seventy-five pounds each

off the floor of the car, bounce them on her knee and onto the floor of the R. P. O. car. She then picked up the incoming mail off the floor of the railroad car and swung it over onto the mail cart .(R. 28, 30). The loaded mail cart was then pulled back to the mail room of the station. Several days after the conversation with Higginbothan, while Petitioner was in the middle of loading and unloading some twelve or fifteen of these bags of mail, she felt a sudden nausea and dizziness. As she got down from the cart and started pulling it back to the station, she felt a sharp pain in her back, and her disability followed. (R. 31).

The jury in the Trial Court returned a verdict for the Petitioner for $5,700.00, and a judgment was entered accordingly. The Court of Appeals for the Fifth Circuit reversed and rendered the judgment on the grounds that Petitioner had failed to present any evidence to support the jury verdict.

SUMMARY OF ARGUMENT

Congress and this Court have combined to grant the injured employee a right to trial by jury on the issue of negligence. Their efforts have been directed toward freeing the injured employee from narrow interpretations and nice distinctions such as those on which this opinion of the lower Court rests.

POINT ONE (RESTATED)

1. The direct order to Petitioner to handle the mail alone in violation of custom and the foreseeable consequences of that order were factors which the jury, and not the Appellate Court, should evaluate.

The opinion of a Court is a concrete example of its philosophy of the law with respect to a given class of cases. Each opinion, therefore, represents much more than a decision on a given set of facts. It represents the thinking of the men who form that Court with respect to a field of law. A comparison of the opinion rendered by the Fifth Circuit in the case at bar with the line of decisions handed down by this Court in cases arising under the Federal Employers' Liability Act since the 1939 Amendment will reflect that the philosophy of the Fifth Circuit is in conflict with the rules of interpretation laid down by this Court. This is a case in which a jury verdict was overturned by the Fifth Circuit on a re-evaluation of the evidence. The very words of the opinion are words used in other arguments before this Court, and heretofore rejected or modified by this Court. The opinion contains the proposition that:

> "under the simple terms of the Federal Employers' Liability Act negligence is the basis of liability. The railroad here was not an insurer of plaintiff's safety, and before recovery can be had plaintiff must show by the evidence that her injury was the proximate result of the railroad's charge negligence." (R. 192).

In the case of *Wilkerson vs. McCarthy*, 336 U. S. 53, (1949), 69 S. Ct. 413, this Court, speaking through Mr. Justice Black, said:

> "That proposition is correct, since the act imposes liability only for negligent injury, Cf. *Coray vs. Southern Pac. Co.*, 335 U. S. 520, 69 S. Ct. 275. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reason-

able and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain under the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business'. *Tiller vs. Atlantic Coast Lines Ry. Co.*, 318 U. S. 54, 67, 63 S. Ct. 444, 451, 87 L. Ed. 610, 143 A. L. A. 967." (P. 61).

The evolution of the employee's right to recovery for industrial injuries from the common law by statute was carefully traced by this Court in the case of *Tiller vs. Atlantic Coast R. Line*, 318 U. S. 54; 63 S. Ct. 444; 87 L. Ed. 610, 143 A. L. R. 967 (1943). The last major change in the Act was wrought by the 1939 amendment which completely abolished the defense of assumption of risk. The Tiller case arose after that amendment and was the first occasion by this Court for a discussion of the impact of that amendment. The Congressional intent was carefully noted and Congressional evaluation of the situation existing prior to the 1939 amendment was summed up in the following words from the report of the Senate Committee on Judiciaries 76 Cong., First Sess., Rept. No. 661, Page 4,

"The present rule apparently ignores the fact that the master, and not the servant, has control over the conditions which affect the safety of the employees . . . The existing rule not only permits the employer to be careless about the conditions of his premises, but, in effect, places a premium upon his carelessness . . .

"Under present economic conditions, employees must, of necessity, continue to work under unsafe conditions, or frequently sacrifice the

fruits of many years of accumulated seniority, go on relief, or beg their bread."

By the passage of this amendment the emphasis was finally and completely shifted from the action of the employee to the actions of the employer. With the substitution of comparative negligence for the doctrine of contributory negligence as a bar, and the complete abolition of the defense of assumption of risk, the criterion in such cases became whether or not the employer had been guilty of any negligence and no action or failure to act on the part of the employee would operate as a bar to his recovery. No longer can the employer by uttering the magic formula "this was the custom" absolve itself from the effects of his own negligence.

The evidence of custom in this case was conflicting. Obviously the custom would vary at different stations along the railroad lines due to the quantity of mail involved. The custom with reference to handling the large amount of mail arriving at a town like Dallas, for instance, would not be the same as that prevailing at a small town like Monahans where the Petitioner worked. Petitioner testified that due to a company policy put into effect several months before she went to the station where she was injured, she had been wearing female attire which made it impossible for her to climb up on the mail trucks and actually handle the mail. (R. 15, 16). Up until several days prior to her injury the mail at Monahans had been handled by a Mexican laborer. (R. 16, 105). According to the testimony of the Respondent's witnesses, it was at all times her duty to assist in handling the mail, but there were other employees assigned to the job also. (R. 90).

Petitioner further testified that a few days prior to the injury her instructions were changed by her immediate superior and she was told that she had to handle the mail alone; that she had hired out to do a man's work and she was going to do it. (R. 18, 44). Regardless of what the custom had been, it was undisputed that the Petitioner handled the mail alone on the morning of her injury, and from this circumstance itself the jury had the right to infer that there was negligence in requiring one person to handle the bags weighing fifty to seventy-five pounds each alone. The lower Court concluded, however, on the record that it was the usual custom for Petitioner to handle the mail alone and that, therefore, no negligence had been shown. (R. 189).

In the Tiller case the lower Court stressed the fact that there had been no departure from custom which occasioned the employee's injury and came to the conclusion that Congress did not intend to increase the master's responsibility to use due care toward his employees. In answer to this contention, this Court said:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence.' As this Court said in facing the hazy margin between negligence and assumption of risk as involved in the Safety Appliance Act of 1893, 45 U. S. C. A. § 1, et. seq., 'unless great care be taken the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name' and no such result can be permitted here." *Tiller vs. Atlantic Coastline R. Co.*, 318 U. S. 54, 63 S. Ct. 444 (1943).

In the words of the Fifth Circuit's opinion in the case at bar exactly the same argument is advanced; that is, that if it was normal and customary for an operator to handle the mail, the employer cannot be guilty of negligence in requiring the operator to handle the mail alone in spite of the fact that help was available which would have minimized the risk to the employee.

The lower Court dwells on the fact that according to their analysis of the record Petitioner failed to suggest to the railroad that the method of doing the work was improper, or that other workmen would have been of assistance to her. The lower Court in effect held that she could not recover because she did not protest in sufficiently strong terms. Again this represents the improper emphasis on the employee's actions rather than on the action of the employer. These circumstances which the lower Court says that the Petitioner failed to point out to her employer were matters over which the employer rather than she had control. Failure to protest can have no bearing on whether or not the action to be protested was negligent or not. It could at most amount to assumption of risk, which, of course, is no longer a defense under the statute. The jury had the right to infer negligence from the fact that the employer allowed her to continue performing a task which could reasonably be foreseen to be beyond her strength. *Comisky vs. Penn. R. R. Co.*, 228 F. 2d 687 (2 C. A., 1956).

There is the additional factor that the Petitioner was a woman, hired to perform duties largely clerical in nature. The duty of handling the mail required nothing more than a strong back. This Court has held that the

employer was bound to consider the likelihood of injuries peculiar to women by reason of their sex and to use reasonable measures to prevent same. *Lillie vs. Thompson,* 332 U. S. 459; 68 S. Ct. 140 (1947). By the same token this employer should have foreseen the possibility of just such an injury as Petitioner received from requiring her to do "man's" work. At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. As stated by this Court in the case of *Patton vs. Texas & Pacific Ry. Co.,* 179 U. S. 658, 664, 21 S. Ct. 275, 277, and re-affirmed by this Court in the case of *Bailey vs. Central Vermont Ry., Inc.,* 319 U. S. 350; 63 S. Ct. 1062-1064.

> "It is a duty which becomes 'more imperative' as the risk increases."

POINT TWO (RESTATED)

2. The strict limits applied by the Court of Appeals to Petitioner's cause of action violate the rules of substance and procedure laid down by this Court.

The facts in this case are very similar to those in the case of *Blair vs. Baltimore & O. R. Co.,* 323 U. S. 600; 65 S. Ct. 545; 89 L. Ed. 490 (1945). There the claimant was injured while attempting to unload some heavy pipes. He had previously told his superior that they did not have enough men. The superior told him to go ahead and do the work or they would get somebody who could. This in effect was the same type of direct order given by Petitioner's superior when she was ordered to handle the mail alone. After outlining the circumstances from which the jury could have inferred negligence in that case, the Court said, at Page 604:

"We cannot say as a matter of law that the railroad complied with its duties in a reasonably careful manner under the circumstances here, nor that the conduct which the jury might have found to be negligent did not contribute to petitioner's injury 'in whole or in part.' Consequently, we think the jury, and not the Court, should finally determine these issues.

The case at bar also closely resembles *Stone vs. New York, Chicago and St. Louis Ry. Co.*, 344 U. S. 407; 73 S. Ct. 358 (1953). The claimant in that case suffered a back injury as a result of pulling too hard on a railroad tie under the direct order of the straw boss. In pointing out that the straw boss had additional men who could have been put on the job, this Court said:

"We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent person would have done under the circumstances. *Wilkerson vs. McCarty*, 336 U. S. 53, 61; 69 S. Ct. 413, 417; 92 L. Ed. 497. To us it appears to be a debatable issue on which fair minded men would differ. *Cf. Bailey vs. Central Vermont Railway Co.*, 319 U. S. 350, 353; 63 S. Ct. 1062, 1064; 87 L. Ed. 1444; *Urie vs. Thompson*, 337 U. S. 163, 178; 69 S. Ct. 1018, 1028; 93 L. Ed. 1282."

The cases cited above are all links in the chain woven by this Court starting with the Tiller case of 1943, and coming down to the present in which this Court has jealously guarded the right of an employee to a jury evaluation of the negligence of his employer which occasions an injury. This steady unbroken chain of interpretation was ignored by the Fifth Circuit in its opinion on this case. The last link in this chain was forged during the last term of Court in the opinion of

Schulz vs. Penn Ry. Co., 350 U. S. 523; 76 S. Ct. 608 (1956). The facts in this case and in the Schulz case are not similar, but there, as here, the Petitioner has the right to recover, if the injury resulted "in whole or in part" from the Respondent's negligence. The Schulz case was one arising under the Jones Act which made the Federal Employers' Liability Act available to seamen. This Court held:

> "In considering the scope of the issues entrusted to juries in cases like this, it must be borne in mind that negligence cannot be established by direct precise evidence, such as can be used to show that a piece of ground is or is not an acre. Surveyors can measure an acre, but measuring negligence is different. The definitions of negligence are not definitions at all strictly speaking. Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done or failing to do that which a person of reasonable prudence would have done under like circumstances. Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases. 'We think these are questions for the jury to determine. We see no reason so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact why it should not decide such questions as these as well as others.' *Jones vs. East Tennessee V. & G. Ry. Co.* 1888, 128 U. S. 443, 445; 9 S. Ct. 118; 32 L. Ed. 478." Page 525.

The Court of Appeals attempted to distinguish the Stone case, the Blair case and the Bailey case by saying that in those cases protest was made immediately before the injury. The Court of Appeals, however, does not make clear whether it is ruling that Petitioner's

cause of action fails because of a variance between pleadings and proof or whether Petitioner's cause of action as proved, fails to establish negligence. The evidence of Petitioner's conversation with her superior and his instructions to perform the handling of the mail, was admitted without objection. Under the provisions of Rule 15-B, of the Federal Rules of Civil Procedure, issues tried by consent are to be treated as though they had been raised in the pleading, and a failure to amend the pleading so as to conform to the proof does not affect the result of trial of those issues.

If the Court is ruling as a matter of substantive law that the claimant cannot recover because she failed to protest on the morning of the injury, though she had made an unsuccessful protest several days before, then the Court is setting up a distinction without a difference. It has said that she may not recover because she was not injured the first time she attempted to carry out duties negligently assigned to her, but was hurt the second or third time she attempted to carry out those duties. Such a strict construction is completely inconsistent with the line of cases decided by this Court and cited above.

The opinion in the Schulz case was published by this Court after the decision was handed down by the Fifth Circuit Court in the case at bar and was strongly urged by this Petitioner in her motion for rehearing before that Court. The other cases cited above were again reemphasized. Petitioner's motion for rehearing was overruled without opinion. Failure to correct the opinion in the present case will not only deprive this Petitioner of her constitutional and statutory right to a trial by jury, but will result in a deprivation of those

same rights to other employees with cases arising under the Federal Employers' Liability Act whose injuries occur within the jurisdiction of the Fifth Circuit Court of Appeals. It will result in one law with two interpretations. The one interpretation being given it in those jurisdictions which adhere to the ruling of this Court, and the second interpretation being given in the geographical limits of the Fifth Circuit. The opinion of a Court is a manifestation of that Court's principles, and only by a correction of an individual opinion can this Court exercise its constitutional function of guidance to the lower Courts.

CONCLUSION

Since the Tiller case, this Court has said in many cases in many ways the same thing—that the issue of negligence is one to be decided by juries under proper charge of the Court. The opinion of the Court of Appeals in the present case is at variance with the opinions of this Court, and the social and economic and statutory factors on which these decisions rest. We earnestly submit that the opinion of the Circuit Court should be reversed and the judgment of the trial Court reinstated.

Respectfully submitted,

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I hereby certify that copy of the above and foregoing brief on the merits was served on J. B. Look, Jr., attorney of record for the Respondent by depositing same in the United States mails addressed to him at the Citizens National Bank Building, Abilene, Texas, this the.....day of February, 1957, in accordance with Paragraph I, of Rule 33, of the Supreme Court Rules.

Davis Scarborough

Attorneys for Petitioner.

MAR 19 1957
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

No. 321

RUBY NELL THOMSON, *Petitioner*

vs.

TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

RESPONDENT'S BRIEF ON THE MERITS

* * *

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* * *

BRIEF FOR THE RESPONDENT

* * *

QUESTIONS PRESENTED FOR REVIEW

1. Is a jury issue presented when a railroad worker is injured while merely performing the usual and customary task of her position without any protest that the work is too strenuous and without any request for assistance?

2. In cases that solely involve an analysis of the factual situations, should the Supreme Court second-guess the lower appellate court, or should it confine its review toward determining whether or not the opinion below is capricious, unreasonable and whether it is based upon a fair appraisal of the record?

STATEMENT

PLEADINGS

The petitioner pled her case based upon the following situation:

On the morning in question she "met Number two train, she noticed that there was an unusually large quantity of Christmas mail to be unloaded from the train, and realizing that she was just a woman and that the mail was extremely heavy, she asked her immediate superior, a man whose name is unknown to the Plaintiff at this time, for help in unloading this heavy mail, but that her superior not only failed, but refused to give her any assistance whatsoever in unloading this heavy mail even though he and other people were available for assistance. Plaintiff says that this immediate superior then ordered the Plaintiff to unload the mail—as she was attempting to do so, she injured her back causing severe injuries to her back." (Tr. 8)

Respondent denied the above allegation. (Tr. 5)

EVIDENCE

The evidence taken in the light most favorable to Petitioner and the undisputed evidence shows the following:

Petitioner was a telegraph operator working for the Respondent. A vacancy occurred in the Monahans, Texas, Station and Petitioner bid for the job. One of her regularly assigned duties was to work the mail and

baggage on any trains that came in on her shift (Petitioner, Tr. 14). Petitioner testified that this was normally part of the agent-operator job everywhere (Petitioner, Tr. 34). In this regard Mrs. Thomson testified on direct examination, as follows:

"Q. Is it normally part of the agent-operator's job to handle mail?

"A. Oh yes, yes." (Petitioner, Tr. 34).

And again on cross-examination, as follows:

"Q. And now, where had you worked where it entailed handling baggage and mail? Mail, particularly mail, is what I am interested in.

"A. Just like I say, the first twenty-five minutes I was on duty I started working mail and I worked that job, I think it was two weeks, and then I worked the mail on Number Eight and on Number Seven, both, and then—well, any place I worked that there was mail to be handled, and the train came on my shift, I just automatically handled the mail.

Usually the agent left a little list on the desk that states for any operator that is relieving temporarily or is new in the office, can read this list and he will name the duties that each operator on that shift will have to perform. And if you are new in the office you just read the list. It is usually there somewhere around the telegraph table, and he will list all the duties you are to perform, and usually it is mail and baggage if there

is a passenger train on that shift that way that is your duty to perform.

"Q. Well, you worked a considerable number of trains then prior to your injury?

"A. I worked them whenever it was necessary for me to.

"Q. And it was usually necessary, wasn't it?

"A. Yes, usually." (Petitioner, Tr. 42-43). She had worked at Monahans before and knew that the job entailed handling mail before she bid for the job (Petitioner, Tr. 38-39) before the date of the alleged accident and she had never had any difficulty in handling her duties before (Petitioner, Tr. 27), even though it was usually necessary in whatever station she was working to handle the mail and baggage (Petitioner, Tr. 43).

The record does show that when she worked in another division for the Railroad she had a conversation with the superintendent with that division who informed her it was all right to wear skirts and hose so long as her job got done (Petitioner, Tr. 16). In this connection Petitioner testified on direct examination, as follows:

"Q. And you were instructed it was all right for you to wear skirts, is that correct?

"A. Just as long as my duties went along satisfactorily and there was no delay in the train it was perfectly all right and he thought it was a fine idea." (Petitioner, Tr. 16).

That for some few weeks she had not handled mail at Monahans, leaving it to others, but that Mr. Higginbothan, the agent in charge of the Monahans Station, reminded her it was her duty to handle the mail. (Higginbothan, Tr. 96-97). This was the only conversation she ever had with her superior about her mail handling and happened some time before the day of the injury. Petitioner worked the mid-night to 8:00 A. M. shift and train Number two was the only train that she was called upon to work during that period. It arrived in Monahans about 7:20 A. M. and it was a very light train insofar as mail and baggage was concerned (Sligh, Tr. 100). The record further conclusively shows, and Petitioner in her brief admits, that she never complained to anyone, her superiors or her fellow workers, that this duty was too heavy for her. (Tr. 91-98)

Briefly, the duties of Petitioner in handling the mail were as follows:

The postal employees bring the mail to the station where they load it up on four-wheel carts which in railway parlance are known as "trucks". A picture of such a truck being shown in Defendant's Exhibit No. 1 (Tr. 36A). This truck is in the mailroom which is locked. The operator gets the key to the mailroom, pulls the truck out onto the station platform, and when the train stops, pulls the truck alongside the railway post office car, climbs upon the truck and transfers the mail on the truck to the railway post office car by handing the mail sacks to the railway post office man. The railway post office man then transfers the mail from the railway post office car destined

for the particular station onto the truck by handing the mail sacks to the operator on the truck. The operator on the truck, when this operation is completed, pulls the truck off away from the train. It was while moving the truck away from the train that she felt a pain in her back.

No defect was shown to have existed on or about the platform, the truck, or the railway post office car and plaintiff does not in her brief claim any such defect.

Mrs. Thomson had been consulting a physician about some kidney infection she had had immediately prior to this occasion. (Tr. 129-136; Bell, Tr. 138-139). There is no evidence that she had told her superior or any of her co-employees of her illness or disability in this regard.

There was no evidence that more than one person could stand on the truck and in the doorway of the R. P. O. Car and transfer the sacks of mail and thus no evidence that an additional person assigned to the job could have prevented the injury.

SUMMARY OF ARGUMENT

I. No jury issue of negligence was presented, since there was absolutely no evidence showing one of the essential elements of negligence, namely, a reasonable anticipation that petitioner might suffer some injury. Merely requiring a worker to perform the ordinary and usual tasks of the occupation which have been performed by the worker hundreds of times and by other employees thousands of times daily, cannot con-

stitute negligence unless the employee has protested that the work is too strenuous for that particular employee, or has requested assistance.

Regardless of the inadequacy of the F. E. L. A. to deal with the social problem of compensation for injured railroad employees, this Court is governed by that Act, and it predicates liability upon negligence of the employer.

Furthermore, Petitioner's failure to introduce in evidence to show that two or more persons could in fact have performed the work assigned, or that assistance would have prevented injury, precludes her from recovery.

II. The Court of Appeals should be affirmed since its decision is neither capricious nor unreasonable, and is based upon a fair appraisal of the facts. It is not the function of this Court to merely second-guess the courts of appeals on questions solely involving an analysis of the facts. The policy of second-guessing the courts of appeals upon such questions demotes those courts to mere stumbling blocks on the way to a final determination by this Court.

ARGUMENT AND AUTHORITIES

I. THERE WAS INSUFFICIENT EVIDENCE OF NEGLIGENCE TO PRESENT A JURY ISSUE SINCE PETITIONER FAILED TO PROVE ANY DUTY OWED TO HER BY THE RESPONDENT.

Actionable negligence has been defined countless

times and in innumerable abstract terms. Each of the definitions, however, encompass the following elements:

(1) The existence of a situation from which a reasonably prudent person would anticipate an injury to another, thus creating a duty to take some measure to protect that person;

(2) A breach of that duty; and

(3) An injury resulting from that breach.

See *Milwaukee & St. Paul Railway Co. vs. Kellogg*, 94 U. S. 469 (1877), and *Holder v. St. Louis-San Francisco Railway Co.*, 172 Fed. (2d) 217 (1949) and *A. L. I. Restatement of Torts*, § 310.

There was absolutely no evidence showing the existence of a circumstance from which respondent could have been expected, under any stretch of the imagination, to have anticipated some injury to the petitioner, thus placing a duty upon respondent to use extraordinary means of precaution.

On the occasion in question petitioner was doing the same job she had previously done on many, many occasions, and the same job that thousands of other railroad employees daily perform throughout the country. Before "bidding the job in", or requesting the job at Monahans, she knew it entailed handling the mail. Her only concern or comment about this position or her assigned work was that she could not wear skirts and hose, as had been requested of her on another Division of the railroad, and still handle the mail. At no time did she complain to her superior, or

to any of her fellow workers who daily occupied desks in the same room with her, that the job was too strenuous for her or that assistance was desired.

Unless an employer has noticed that an employee is suffering from some physical defect or disease, the employer is entitled to assume that the employee is a person in ordinary physical condition and is obligated to furnish assistance only if the work is too strenuous for a person of ordinary physique. *Louisville & N. R. Co. vs. Willhite*, 187 S. W. (2d) 1010 (Ky.) (1943). *Texas & Pacific Ry. Co. vs. Rampy*, 71 S. W. (2d) 387 (Tex. Civ. App.) (Error Dismissed) (1934).

Petitioner cites no cases, and respondent has been unable to find any case, holding that a jury issue is presented when there has been no protest that the work is too strenuous and no request for additional help. Although this Honorable Court has not passed on this precise question, other courts have passed upon the question and have been unanimous in denying recovery upon the ground that no duty arose by reason of the lack of knowledge on behalf of the employer, since there could have been no reasonable anticipation of injury to the employee.

In *Wadiak vs Illinois Central RR Co*, 208 Fed. (2d) 925 (C. A. 7) (1953), the Court was faced with a contention of negligence on the ground of insufficient help without protest or request on behalf of the employee, and the Court stated, at page 929:

> "In the absence of proof that such aid was sought and denied to him, or that any need for

help was brought to defendant's notice, plaintiff cannot rely on this contention."

To the same effect see *Louisville & Nashville R. Co. vs. Green*, 53 So. (2d) 358 (Ala.) (1951); *August vs. Texas & N. O. R. Co.*, 265 S. W. (2d) 148, (Tex. Civ. App.) (Writ refused, N. R. E.) (1954); *Lowden vs. Bowen*, 183 Pac. (2d) 980 (Okla.) (1947); and *Mercier v. Texas & N. O. R. Co.*, 293 S. W. (2d) 80 (Tex. Civ. App.), (Writ Refused, N. R. E.) (1956). All of these were F. E. L. A. cases arising after the abrogation of assumption of risk doctrine. See also, *Annotations* in 175 A. L. R. 1003 *et seq.*, and 36 A. L. R. (2d) 22, *et seq.*

In Texas, if an eligible employer fails to subscribe for Workmen's compensation insurance, the employee may recover upon the ground of negligence, and the defenses of assumed risk and contributory negligence are expressly denied the employer, thus cases of that nature are of value.

The Supreme Court of Texas in *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 S. W. (2d) 249 (1943) stated, at page 251:

"Although injury may result from a person's act or omission, yet, if the actor could not have reasonably foreseen the resultant injury, or injuries, similar in character, he is not to be held responsible therefor.....

"Measured by the above rules of law, we are convinced that the facts of this record fail, as a matter of law, to convict A. & P. of actionable negligence..... Evans cannot complain if A. & P. merely required him to do the usual and cus-

> tomary work required of persons in his line of employment, or, stated in another way, required by the character of the business in which he was employed."

See also *Western Union Telegraph Co. v. Coker*, 204 S. W. (2d) 977 (1947) also by the Supreme Court of Texas.

While none of the above cited cases are binding upon this Honorable Court, under the doctrine of *stare decisis*, the very unanimity of the decisions rendered by the court of appeals and courts of last resort in the sovereign states, are entitled to great weight in this Honorable Court.

Each of the "strain cases" cited by petitioner, *Stone vs. New York, Chicago & St. Louis Ry. Co.*, 344 U. S. 407 (1953), *Blair vs. Baltimore & Ohio Ry. Co.*, 323 U. S. 600 (1945) and *Comiskey vs. Pennsylvania Railroad Co.*, 228 Fed. (2d) 687 (2 C. A. 1956), involved a protest that the work was too strenuous, or a request for additional help on behalf of the worker.

Petitioner in her brief asserts that under the doctrine of *Tiller vs. Atlantic Coast Line*, 318 U. S. 54 (1943), the actions of the employee are immaterial, since all vestiges of the doctrine of assumption of risks have been abrogated. That such doctrine has been abrogated is uncontroverted. However, the point here made is not that the petitioner assumed the risk by failing to ask for help or make complaint, but that in the absence of such complaint or request, respondent could not have anticipated an injury to her, thus

giving rise to the duty to relieve petitioner of her duties, or furnishing her additional assistance.

Although petitioner had ample opportunity through her own testimony, or through the testimony of any of the other witnesses for the railroad, to show that more than one person could perform the job of lifting sacks between the R. P. O. car and the truck, she did not choose to do so. She did not introduce any evidence that more than one person could stand in the doorway of the R. P. O. car. In other words, she did not introduce evidence to show that if additional assistance had been available she would not have had to lift the sacks by herself.

This Honorable Court has criticized the Federal Employers Liability Act in that it predicates compensation for industrial injuries suffered by railroad employees upon negligence on behalf of the employer, and has construed the Act liberally in favor of the worker. See Mr. Justice Frankfurter's concurring opinion in *Wilkerson vs. McCarthy*, 336 U. S. 53, 65-66 (1948). See also *Schulz vs. Pennsylvania R. R. Co.*, 350 U. S. 523 (1956).

However inappropriate and outmoded the F. E. L. A. may be in coping with the social problem of compensation for injured railroad employees, Congress has in fact predicated liability upon negligence by a solemn Act of that body, and any amendment, alteration or change in this law lies in the exclusive province of the legislative branch of the government and not in the judicial branch.

Judge Goodrich writing for the Third Circuit in *Eckenrode vs. Pennsylvania R. Co.*, 164, Fed. (2d) 996 (1947) *affirmed* 335 U. S. 329 in setting aside a jury verdict and rendering judgment for the railroad stated at page 1000:

> "Any Federal Judge who sees these railroad accident cases come in and go out of the courts must be troubled by the unsatisfactory social results obtained. Some claimants go out with very large verdicts. Others go out with nothing. Yet in each case the injury has come as part of the business of train movement and the disastrous consequences upon the victim or his family are equally heavy. But so long as the law is that the defendant must be negligent for the plaintiff to recover for his injuries it is our responsibility to apply the negligence test honestly and not to pretend that there is negligence when it does not exist."

To the same effect see *Wolfe vs. Henwood*, 162 Fed. (2d) 998 (C. A. 3) (1947), *cert. den.* 332 U. S. 773.

When there are no contested issues of material fact, it becomes the duty of the trial court to take the case from the jury. This is applicable in F. E. L. A. cases. This Court in *Brady vs. Southern Railway Co.*, 320 U. S. 476 (1943), stated the proposition as follows, at pp. 479, 480:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit directed verdict or otherwise in accordance with the applicable practice without submission

to the jury, or by judgment notwithstanding the verdict. By such direction of the trial the result is saved from the mischance of speculation over legally unfounded claims."

The simple unvarnished facts in the instant case show that an employee who had been suffering from a kidney ailment without the knowledge of the employer was injured while doing the normal and usual tasks that she and thousands of other railroad employees have done and now do every day without mishap. A holding that a jury issue was presented in this case would in fact be a holding that the mere occurrence of an injury is evidence of negligence raising a jury issue, and there would be no redress from unreasoned verdicts based upon wild speculation or sympathy for the injured party.

II. THIS COURT SHOULD AFFIRM A CAUSE INVOLVING ONLY A SUFFICIENCY OF THE EVIDENCE QUESTION, IF THE OPINION BELOW IS NEITHER CAPRICIOUS NOR UNREASONABLE AND IF BASED ON A FAIR APPRAISAL OF THE RECORD.

The principal function of this court is to decide causes containing fundamental questions with far-reaching application of which it has cognizance, and thus provide guide-posts and light the way for bench, bar and citizen to a better understanding of the ever-winding road of our laws in this rapidly changing world. Settling a controversy justly between any two litigants is a minor and subsidiary function of this court. It is therefore the policy of this court to deny

review where the case turns solely upon an analysis of the particular facts involved. See *Labor Board vs. Pittsburgh Steamship Company*, 340 U. S. 498. (1951). See also Mr. Justice Harlan's dissent in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central Railway Company, Herdman vs. Pennsylvania Railroad Company*, and *Ferguson vs. Moore-McCormack Lines*, 25 U. S. Law Week, 4130, *et seq.* (1957).

A notable exception to this policy has been in the family of employer liability cases involving the question of sufficiency of the evidence to prove negligence. From the 1938 through the 1954 terms of this court, the court granted review in 46% of the applications on sufficiency of the evidence question filed by the workers. In this term of court, four of these cases have already been decided. We understand that aside from this case, there is at least one more up for consideration by this court.

An explanation of this exception may perhaps be due to the natural sympathy we all feel for an uncompensated, seriously injured workman. This Honorable Court, already overburdened with work, has thus further increased its work load in an attempt to see that no individual injured worker may be deprived of his compensation unjustly.

The alarming amount of time spent by this Court on these questions has in the past evoked criticism from both within and without the court. See Mr. Justice Frankfurter's decision in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central*

Railway Company, Herdman vs. Pennsylvania Railroad Company, and *Ferguson vs. Moore-McCormack Lines,* 25 U. S. Law Week, 4119, *et seq.* (1957), and note in 69 *Harvard Law Review,* 1441 *et seq.,* (1956).

It is reasonable to suppose that such criticism will continue with some degree of justification, since this court owes a duty to protect litigants in diversity of citizenship cases as well as litigants in the employer liability cases, and yet there is a wide disparity of treatment in the two types of cases.

Our courts of appeals were intended to be courts of last resort in all but those few cases involving widespread fundamental questions.

An examination of the decisions of this court on this question, because of the very nature of the subject matter, is of little or no value to inferior courts, the bar and litigants in resolving questions other than those identical in the most minute detail with a decision of this court in other pending and future cases. The decisions have not had the effect of reducing appellate litigation by settling these cases, but have actually increased appellate litigation.

A further examination of these decisions shows that each Justice has made his own analysis of the facts in each case, and determined therefrom whether or not he would have taken the case from the jury had he sat upon the trial bench, without regard to the opinion of the intermediate court. Competent judges have in the past, and will in the future, disagree as to whether or not they would have submitted a particular

case to the jury. The final result of the cases decided by this court have depended primarily upon the background and disposition of the majority of the Justices then sitting upon the court.

The problem has been very aptly stated as follows:

"If there were a bright line dividing negligence from non-negligence, there would be no problem. Only an incompetent or a wilful judge would take a case from the jury when the issue should be left to the jury. But since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury . . . . . The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge." *Wilkerson vs. McCarthy*, 336 U. S. 64, 65 (concurring) (1949).

In past decisions this Court has merely substituted the opinion of its individual Justices for the opinion of the court of appeals or court of last resort of one of the sovereign states. It has been a second-guessing game or a matter of a coin flip.

This manner of deciding the cases and in addition the great percentage of applications granted, has given rise to a vicious circle, tending to increase more and more the time spent by this court on such cases. The unsettled condition of the law and the determina-

tion of so many of these cases by this court, has judicially encouraged the filing of more petitions for Writ of Certiorari, and the unfortunate litigant whose application is not granted, feels discriminated against, with some justification. The very same feeling within the court may give rise to granting more and more writs and again and again second-guessing inferior courts.

This policy has demoted our courts of appeals and the highest courts of our sovereign states from courts of last resort into mere intervening, expensive and time-consuming stumbling-blocks for the litigants on their way to reach this Court. This accident occurred in 1953. It has still not been settled, and before it is settled each of the parties will have expended over $1,500.00 in out-of-pocket expenses, not including attorneys' fees.

An adoption of a policy of overturning decisions of the courts of appeal and the courts of last resort in our sovereign states, only if the decisions of those courts are capricious, unreasonable or based upon an unfair appraisal of the facts, will to a great extent take this court out of the field of second-guessing those court's analyses of the facts, and still afford this court ample opportunity to correct serious and palpable errors committed below.

The decision of the Court of Appeals for the Fifth Circuit in the instant case, is a well considered opinion, based upon an exhaustive examination of the facts, as is evidenced from the mere reading of the opinion. That court, after due deliberation, found

that the jury verdict in this case was not based on evidence sufficient to enable a reasoning man to infer both negligence and causation by reasoning from the evidence, which is the test laid down in *Moore vs. Chesapeake and Ohio Railway Company*, 340 U. S. 573 (1951). The Court of Appeals dutifully performed its function to see that jury verdicts stay within that boundary, and that they be arrived at by reason and not by will of sheer speculation. The Court of Appeals for the Fifth Circuit is an honorable court, composed of competent and conscientious judges, who, after due deliberation, have determined that the jury verdict in this case was not arrived at by reason but by will born of sympathy or out of sheer speculation.

In the light of all of the facts in the case, this Honorable Court therefore should not reverse that decision merely because individual justices would have disagreed with the result. That decision should only be reversed in the event the court finds that the decision was not based upon reason or an unfair appraisal of the facts. See Mr. Justice Harlan's dissent in *Rogers vs. Missouri Pacific Railway Company, Webb vs. Illinois Central Railway Company, Herdman vs. Pennsylvania Railroad Company*, and *Ferguson vs. Moore-McCormack Lines*, 25 U. S. Law Week, 4130, 4131, 4132 (1957).

If the practice of mere second guessing the inferior courts in these cases is continued, the function of the courts of appeal or the state court of last resort is nugatory, and in the interest of time and justice, the parties and the judicial system could be saved time

and expense by a direct petition for writ of certiorari to this Court from the trial court.

CONCLUSION

For the reason stated, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

OF COUNSEL:

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JOHN B. POPE

J. B. LOOK

I hereby certify that a copy of the above and foregoing brief on the merits were served on Messrs. Dallas Scarborough, Davis Scarborough and Madam Beverly Tarpley, attorneys of record for the petitioner, by depositing a copy for each of them in the United States Mails, addressed to each of them at the Alexander Building, Abilene, Texas, this the 16th day of March, 1957, in accordance with Paragraph I of Rule 33 of the Rules of the Supreme Court of the United States.

JOHN B. POPE

FILED
MAY 3 1957
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 821

OCTOBER TERM, 1956

* * *

RUBY NELL THOMSON, *Petitioner*

vs.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
DECIDED BY THIS COURT ON MARCH 4, 1957

* * *

PETITION FOR REHEARING

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

NO. 321

OCTOBER TERM, 1956

* * *

RUBY NELL THOMSON, *Petitioner*

VS.

THE TEXAS & PACIFIC RAILWAY COMPANY, *Respondent*

* * *

PETITION FOR REHEARING

Respondent presents its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

GROUNDS FOR REHEARING

The memorandum per curiam opinion of this Honorable Court is in direct conflict with prior full opinions of this Court and summarily overrules long established unanimously accepted rules of law.

ARGUMENT

The decision in this cause leaves the only question involved unsolved. The per curiam order when taken together with the published opinion of the Court of Appeals below is ambiguous. Bench and bar cannot determine whether the decision of this Honorable Court herein means that it is unnecessary for an employee to request the assistance when injured performing the regular duties of the employment and thus by implication overruling a proposition of law heretofore unan-

imously followed by all of the courts or whether the decision meant that the Court found in the instant case the employee did in fact present sufficient evidence to warrant a finding that a request had been made to present a jury issue. Either proposition is in conflict with prior opinions of this Court and with a unanimous line of decisions by inferior United States Courts and courts of last resort of our sovereign states. See: *Louisville & N. R. Co. vs. Willhite*, 187 S. W. 2nd 110 (Ky.) (1943); *Texas & Pacific Ry. Co. vs. Rampy*, 71 S. W. 2nd 387 (Tex. Civ. App.) (Error Dismissed) (1934); *Wadiak vs. Illinois Central R. R. Co.*, 208 Fed. 2nd 925 (C. A. 7) (1953); *Louisville & Nashville R. Co. vs. Green*, 53 So. 2nd 358 (Ala.) (1951); *August vs. Texas & N. O. R. Co.*, 265 S. W. 2nd 148 (Tex. Civ. App.) (Writ refused, n.r.e.) (1954); *Lowden vs. Bowen*, 183 Pac. 2nd 980 (Okla.) (1947); *Mercier vs. Texas & N. O. R. Co.*, 293 S. W. 2nd 80 (Tex. Civ. App.) (Writ refused, n.r.e.) (1956); *Great Atlantic & Pacific Tea Co. vs. Evans*, 175 S. W. 2nd 249 (1943); *Western Union Telegraph Co. vs. Coker*, 204 S. W. 2nd 977 (1947); *Stone vs. New York, Chicago & St. Louis Ry. Co.*, 344 U. S. 407 (1953); *Blair vs. Baltimore & Ohio Ry. Co.*, 323 U. S. 600 (1945); *Comiskey vs. Pennsylvania Railroad Co.*, 228 Fed. 2nd 687 (2 C. A. 1956).

This cause was tried in the trial court upon the pleadings of the plaintiff alleging a request for assistance and a refusal to supply the assistance and the trial court based its charge to the jury upon that basis. (Tr. 168-169). The Court further instructed the jury:

> "Unless you find and believe from a preponderance of the evidence that the plaintiff has established her case as alleged in her complaint, which

was read to you, you will find for the defendant." (Tr. 170).

No objection was made to this charge by the plaintiff and it is the law of the case. The evidence wholly failed to establish a request in refusal for assistance and the employee has never since claimed there was such a request and refusal and the employee has never claimed there was any such evidence.

In the event the Court by its decision intended that the employee had asked for help or had been instructed not to ask for help this Court is by implication overruling the cause of *Brady vs. Southern Railway Co.*, 320 U. S. 476 (1943) which unequivocally laid down the rule that there must be more than a scintilla of evidence before a cause may be submitted to the jury.

It must be remembered that this was not a circumstantial evidence case. All of the persons concerned were available and testified at length. The employee's counsel on direct examination developed in meticulous detail everything which was said between her and her superior. It is true that at one time when asked if she asked another employee for help, she stated:

> "No. I had been instructed I was not to ask, I couldn't have anyone to work the mail with me, there wasn't any need to ask." (Tr. 44).

But when pressed a little further with the question:

> "Actually, wasn't the duties outlined to you to assist with the mail and baggage?" (Tr. 45).

She replied:

> "No. Mr. Higginbothm told me, now this is just oral, but this is what he said, the best I can remember, I was to take this one car, this one truck, and take it out and take what is on there and put it on the train and take this on the train and bring it and put it back into the baggage room" (Tr. 45).

This is all of the evidence upon this point. She nowhere testified that *any superior* instructed her to that effect.

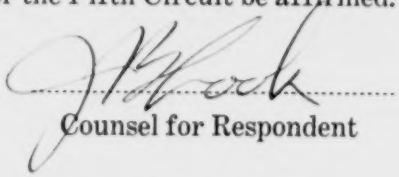
A jury may not properly take any one particular statement completely out of context and without regard to any clarification the witness may have made on the statement.

The mere unresponsive statement that she had been instructed not to ask and that there was not any need to, when taken together with the facts that she related all of her relevant conversations with any supervisors and that none of these conversations or communications showed that she had in fact been so instructed would present at most a mere scintilla of evidence which cannot support a jury issue. While ordinarily disposition of this case by memorandum decision would be in order in view of the recent full treatment of sufficiency of the evidence questions by this Court, the memorandum order issue entered upon closer examination shows that it has the effect of overruling by implication one of two long, well-established principals of law heretofore followed by this Honorable Court and bench and bar can not determine which one the Court intended to overrule and gives rise to the need for this Honorable Court to take up these questions separately

in later causes in order to clarify this Honorable Court's position and settle the law.

CONCLUSION

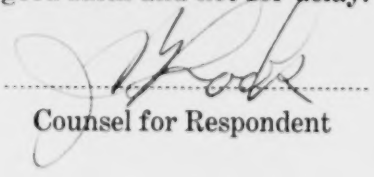
For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, the judgment of the Circuit Court of Appeals for the Fifth Circuit be affirmed.



Counsel for Respondent

CERTIFICATE OF COUNSEL

I, J. B. Look, counsel for the above-named respondent, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.



Counsel for Respondent

proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500; *Webb* v. *Illinois Central R. Co.*, 352 U. S. 512; *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521. The judgment of the Court of Appeals is reversed and the case is remanded. MR. JUSTICE FRANKFURTER would dismiss the writ as improvidently granted. See his dissent in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 524. MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER dissent for the reasons given in MR. JUSTICE HARLAN'S opinion in *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 559. *Beverly Tarpley* argued the cause for petitioner. With her on the brief were *Dallas Scarborough* and *Davis Scarborough*. *J. B. Look* argued the cause for respondent. With him on the brief was *John B. Pope*. Reported below: 232 F. 2d 313.

No. 321. THOMSON *v.* TEXAS & PACIFIC RAILWAY CO. Certiorari, 352 U. S. 877, to the United States Court of Appeals for the Fifth Circuit. Argued April 2, 1957. Decided April 8, 1957. *Per Curiam:* We hold that the